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IN THE

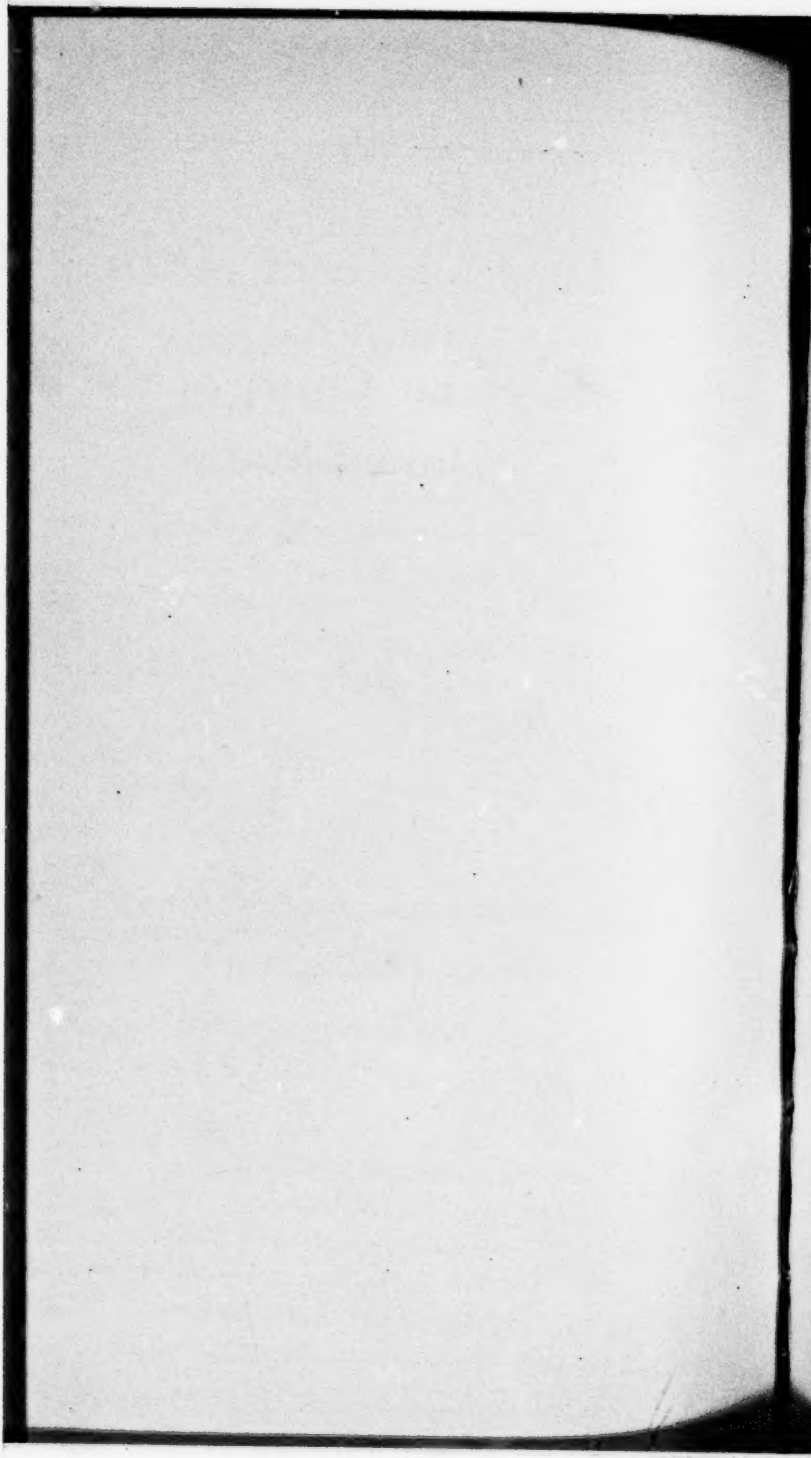
Supreme Court of the United States

Original ..... No. 21.

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND FOR RULE TO SHOW CAUSE, AND PETITION FOR WRIT OF MANDAMUS.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.



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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND FOR RULE TO SHOW CAUSE.

Now come the petitioners, Northern Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation cre-

ated and existing under and by virtue of the laws of the State of Wisconsin, and Chicago, Burlington & Quincy Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, and move for leave to file the petition hereto annexed for a Writ of Mandamus, and further move that a rule be entered and issued directing the Honorable George M. Bourquin, District Judge of the United States for the District of Montana, and the District Court of the United States for the District of Montana, to show cause why a Writ of Mandamus should not issue against them in accordance with the prayer of said petition; and why said petitioners should not have such other and further relief in the premises as may be just and meet.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

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IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

PETITION FOR WRIT OF MANDAMUS.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition of Northern Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the

laws of the State of Minnesota, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, and Chicago, Burlington & Quincy Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, respectfully shows:

1. That on the 15th day of April, 1929, a suit was commenced in the United States District Court for the District of Montana, by petitioners against the Board of Railroad Commissioners of the State of Montana, and Lee Dennis, Daniel Boyle and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners, and L. A. Foot, as Attorney General of the State of Montana, by the filing of a duly verified bill of complaint, a copy of which is hereunto annexed, marked Exhibit A and made a part hereof.

2. That said bill of complaint, after alleging the states of incorporation of the plaintiffs and that the defendants are citizens of the State of Montana and resident within the District of Montana, alleges that the suit is one arising under the Constitution and Laws of the United States, particularly under the Commerce Clause of the Constitution and the Fourteenth Amendment thereof, and the Act of Congress known as the Interstate Commerce Act, and involves, exclusive of interest and costs, over three thousand dollars ($3,000) as between each one of the plaintiffs and the defendants.

The powers and duties of defendants are set forth, particularly the power of the Board of Railroad Commissioners to fix rates for the transportation of freight by railroad within the State of Montana, and the duty of defendants to compel railway companies to obey the orders of the Board of Railroad Commissioners and to institute proceedings for the collection

of penalties for failure to obey the laws of the state relative to publishing tariffs and the collection of rates, fares and charges. An order of the Montana Commission which would reduce intrastate rates on petroleum and petroleum products approximately 29%, and would reduce intrastate revenues of the defendants four hundred thousand dollars ($400,000) annually, and would reduce interstate revenues an additional amount through consequent depression of interstate rates, is set forth; the interdependence of Montana intrastate petroleum rates and interstate petroleum rates is explained; and the resulting burden on and discrimination against interstate commerce and localities in adjoining states from which shipments of petroleum and petroleum products are made to points in the State of Montana are set forth in detail. After pleading these and other facts it is alleged that the order of the Montana Commission is violative of paragraph (4) of Section 13 of the Interstate Commerce Act, which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in interstate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

The pendency of a proceeding before the Interstate Commerce Commission under said Section 13 of the Interstate Commerce Act to determine whether or not the order of the Montana Commission does in fact discriminate against interstate commerce and against persons and localities in interstate commerce is pleaded. The bill then sets forth the irreparable loss and damage that will be incurred by plaintiffs if compelled to charge the lower scale of rates during the period that must elapse before the Interstate Commerce Commission hears petitioners' Section 13 application and acts upon it.

That defendants threaten and intend to commence numerous proceedings and prosecutions, both for equitable and mandatory and other relief, and for a multiplicity of penalties in order to force the plaintiffs to charge and collect the new scale of rates, is alleged. It is further alleged that such proceedings would prevent petitioners from obeying the mandate of the Interstate Commerce Act against unlawful discriminations and would directly discriminate against and burden interstate commerce. It is also alleged that the penalties for the failure to put the new rates into effect are so severe as to compel compliance, though petitioners are convinced that such rates will ultimately be found unreasonable, and it is pleaded that said penalties are so large as to deny plaintiffs the equal protection of the law and deprive them of their property without due process of law. Petitioners allege that they are without adequate remedy at law. The bill prays that defendants be enjoined and restrained only until the Interstate Commerce Commission has determined the Section 13 case brought by plaintiffs, unless it be determined in said proceedings by the Interstate Commerce Commission that the proposed scale of rates would unlawfully discriminate against interstate commerce or persons or localities in interstate commerce and direct the establishment or permit the establishment of intrastate rates on a higher basis than the proposed scale, in which event the petitioners prayed that defendants be perpetually enjoined and restrained from enforcing the said lower scale of rates.

3. That the laws of Montana which provide penalties for failure to publish and collect the schedules of rates prescribed by the Board of Railroad Commissioners of Montana are as follows:

Section 3795 of the Revised Codes of Montana of 1921 provides for publication by the Board of schedule of rates prescribed, and further provides:

"Each railroad affected by the provisions of this act shall display, in a conspicuous place in each of its stations in this state, a schedule printed in plain, legible, English type, showing all classifications and rates fixed and established by the said board. Any failure or refusal on the part of any railroad to comply with the provisions of this section shall subject such railroad to a penalty of not less than one hundred dollars nor more than five hundred dollars for each day that such failure or neglect is continued."

Section 3804 provides:

"If any railroad subject hereto, directly or indirectly or by any special rate, rebate, drawback, or other device, shall charge, demand, or receive from any person, firm, or corporation, a greater or less compensation for any service rendered, or to be rendered, in the transportation of property subject to the provisions of this act, than that fixed by the said board of railroad commissioners for such service, such railroad shall be deemed guilty of extortion, and shall forfeit any pay to the state of Montana not less than five hundred dollars nor more than two thousand dollars for each offense; provided, that nothing herein shall be so construed as to prevent any railroad or railroad corporation from giving excursion rates to or from any point within or without the state."

Section 6521 provides:

"If any railroad corporation within this state shall ask, charge, or demand any exorbitant rate of compensation for the transportation of any freight, * * * or make any unjust discrimination in its rates * * * shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for the first offense in the sum of one thousand dollars, and for the second violation of the same provision, two thousand dollars, and for every other and further violation of any provision of which it has been twice before found guilty, a sum not less than five nor more than ten thousand dollars."

4. That the law of Montana (Section 3809 of the Revised Codes of Montana of 1921) which permits a review of an order of the Board of Railroad Commissioners prescribing rates requires that such rates be charged and collected during the pendency of the proceedings in state court. This law provides:

> "That until the final decision in any such action the classification, rates, toll, charge, regulation or order of the board affecting rates or charges shall be deemed to be final and conclusive."

This section was considered by the Supreme Court of Montana in *State vs. District Court,* 53 Mont. 229, 163 Pac. 115, from which it clearly appears that defendants are wholly without remedy in state court as that court would have no authority to suspend the lower scale of rates pending a review of the order of the Board of Railroad Commissioners.

Section 3803 of the Revised Codes of Montana of 1921 provides that if upon hearing the court shall find that the rates fixed by the Board of Railroad Commissioners are unjust and unreasonable it shall thereupon be the duty of said Board to make new rates.

5. That a copy of the petition under Section 13 of the Interstate Commerce Act filed by petitioners and referred to in said bill of complaint is hereunto annexed, marked Exhibit B and made a part hereof.

6. That at the time of filing said bill of complaint there was also filed and presented to the Honorable Charles N. Pray, one of the District Judges of the United States for the District of Montana, a motion for a temporary restraining order and a request to convene a court of three judges to hear petitioners' application for a temporary injunction, as provided by Section 266 of the Judicial Code, Section 380, Title 28 U. S. C., a copy

of which motion and request is hereunto annexed, marked Exhibit C, and made a part hereof.

7. That on said 15th day of April, 1929, said Judge Pray granted said motion for a temporary restraining order and issued such order, a copy of which order is hereunto annexed, marked Exhibit D, and made a part hereof.

8. That on the said 15th day of April, 1929, bonds in favor of the United States of America, as required by said restraining order, approved by said District Judge, were filed in said cause.

9. That on the 16th day of April, 1929, said restraining order was served by the United States Marshal of said District upon said Board of Railroad Commissioners and each of the members thereof, and upon L. A. Foot, Attorney General of the State of Montana, and upon Honorable J. E. Erickson, Governor of said state, by delivering to each of the members of said Board and to the said Governor and to L. V. Ketter, Acting Attorney General, a copy of said order, duly certified by the Clerk of said District Court, under the seal of said court, to be a true and correct copy, and subpoenas were also served on each of the defendants.

10. That thereafter and on the 6th day of May, 1929, the defendants in said cause served and filed their motion to dismiss said bill of complaint, a copy of which hereunto annexed, marked Exhibit E, is made a part hereof, and on the same day defendants served and filed their motion to dissolve said restraining order, a copy of which hereunto annexed, marked Exhibit F, is made a part hereof.

11. That thereafter and on the 23rd day of May, 1929, notice of the hearing of said motion to dissolve said restraining order before the Honorable George M. Bourquin, one of the United

States District Judges for the District of Montana (but not the Judge who had issued the temporary restraining order), on the 28th day of May, 1929, at the hour of 9:30 o'clock A. M. was served upon the attorneys for the petitioners and filed in said cause on the 24th day of May, 1929, a copy of which hereunto annexed, marked Exhibit G, is made a part hereof.

12. That at the time and place specified in said notice a hearing was had before the Honorable George M. Bourquin, United States District Judge, and the said petitioners appeared by one of their attorneys, M. S. Gunn, and objected to the hearing of said application upon the ground and for the reason that said District Judge and said District Court were without jurisdiction to consider or decide said application and in support of said objection, both orally and by written memorandum filed with the Court, cited and directed the attention of said Judge and Court to the case of *Ex Parte Metropolitan Water Company,* 220 U. S. 539, and the case of *Cumberland T. & T. Co. v. Louisiana Pub. Serv. Com.,* 260 U. S. 212, and urged him to hold that he had no jurisdiction in the case and that only a court of three judges, convened pursuant to Section 266 of the Judicial Code, had jurisdiction.

13. That on the 31st day of May, 1929, the said Honorable George M. Bourquin, District Judge, filed his opinion, decision and order dismissing said cause, a copy of which is hereunto annexed, marked Exhibit H, and made a part hereof.

14. That the motion to dismiss said bill of complaint was neither presented, argued nor submitted for decision, as appears from the minutes of said court, a copy of which hereunto annexed, marked Exhibit I, is made a part hereof.

15. That up to the time Judge Bourquin dismissed petitioners' bill of complaint, Judge Pray, who had issued the temporary restraining order, had not convened a court of three

judges as prayed for by petitioners herein to hear and determine the right of petitioners to an interlocutory injunction, as provided in Section 266 of the Judicial Code, Section 380, Title 28, U. S. C. That it was the duty of Judge Pray to call immediately two judges to his assistance to hear petitioners' motion for an interlocutory injunction, and at the time Judge Bourquin dismissed the bill of complaint petitioners were waiting for Judge Pray to fix the date of hearing before three judges and to call in said judges and give petitioners the hearing to which they are entitled under Section 266 of the Judicial Code as construed and enforced by this court. That Judge Pray at no time refused to call two other judges to his assistance and it is the understanding and belief of petitioners that he would have done so were it not for the unlawful action of Judge Bourquin in dismissing petitioners' bill of complaint. That Judge Bourquin was wholly without power or jurisdiction to dissolve said temporary restraining order or to dismiss the bill of complaint issued by Judge Pray, and the order of Judge Bourquin, Exhibit H hereto attached, is void and without force and effect.

16. That after District Judge Pray considered petitioners' bill of complaint and issued a temporary restraining order and accepted the application for the convening of a court of three judges to pass upon petitioners' application for an interlocutory injunction Judge Bourquin had no jurisdiction to interfere with and upset and reverse Judge Pray and dismiss petioners' bill of complaint and thus prevent the calling together of said court of three judges.

17. That said District Judge Bourquin was wholly without jurisdiction to pass upon the merits of the petitioners' cause of action for the further reason that it is provided in Section 380, Title 28, U. S. C. that in a case in which an application

for an interlocutory injunction is made to three judges the requirement of a three judge court also applies to the final hearing of such suit in the District Court.

18. That said Section 380, Title 28, U. S. C. makes no provision for an appeal from an order by a single judge dismissing a bill of complaint after the issuance of a temporary restraining order by said judge, or some other district judge, and pending the convening of a court of three judges to pass upon an application for an interlocutory injunction and a right of appeal is not otherwise given. That petitioners are remediless except by Writ of Mandamus to compel said Judge Bourquin and the District Court for the District of Montana to annul and set aside the order of May 31, 1929, dismissing petitioners' bill of complaint.

WHEREFORE petitioners pray that a rule be entered and issued directing the Honorable George M. Bourquin, District Judge, and the District Court for the District of Montana to show cause why a Writ of Mandamus should not issue against them to annul and set aside the order of May 31, 1929, dismissing the petitioners' bill of complaint, and for such other and further relief as to Your Honors may seem meet; and your petitioners further pray that said Writ may issue accordingly.

NORTHERN PACIFIC RAILWAY COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,

STATE OF MINNESOTA,
County of Ramsey.—ss.

B. W. SCANDRETT, being duly sworn, deposes and says he is Vice President of the Northern Pacific Railway Company, one of the petitioners in the above entitled petition; that he has read the foregoing petition and knows the contents thereof; that the allegations of the same are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

B. W. SCANDRETT.

Subscribed and sworn to before
me this 8th day of June, 1929.
G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.
My commission expires Oct. 21, 1935.
(Notarial Seal)

EXHIBIT A.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
..... DIVISION

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

VS.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

BILL OF COMPLAINT.

To the Honorable, the Judges of the District Court of the United States for the District of Montana:

Northern Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation created and existing under

and by virtue of the laws of the State of Wisconsin, and Chicago, Burlington & Quincy Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, bring this their bill of complaint against Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, citizens of the State of Montana and residents within the said district and thereupon complain and allege:

I.

This is a suit arising under the Constitution and laws of the United States, particularly under the Commerce Clause of the Constitution and the Fourteenth Amendment thereof, and the Act of Congress known as the Interstate Commerce Act, and involves, exclusive of interest and costs, over three thousand dollars as between each one of the plaintiffs and said defendants. The plaintiffs sue in their own behalf and in behalf of all railroad companies similarly situated for the reason, among others, that much of the business hereinafter described is competitive and must be done by all the carriers at the same rate.

II.

The defendants, Lee Dennis, Daniel Boyle and Leonard C. Young, are members of and constitute the Board of Railroad Commissioners of the State of Montana, and under the general statutes of the state are charged with the duty of enforcing the state laws and statutes applicable to railway companies. The defendant, L. A. Foot, is Attorney General of the State of Montana and is charged with the duty, under the general statutes thereof, of acting as counsel for said Board of Railroad Commissioners with the duty of assisting them in the enforcement of the laws and statutes and orders of the Board of Railroad Commissioners applicable to railway companies.

III.

Among the powers entrusted to said Board of Railroad Commissioners by the laws of the State of Montana, and particularly by Chapter 37, Session Laws, 1907 (Chapter 257, Sections 3779-3847, Revised Codes of Montana, 1921), is the power to fix rates and charges for the transportation of freight within the State of Montana. The Board is required to fix rates that are just and reasonable and non-discriminatory and it may fix different rates for different roads or for different parts of the same road and may alter or amend any rate previously established by it. Any failure or refusal by any railroad company to comply with the provisions of Section 3795, Revised Codes of Montana, 1921, shall subject such railroad to a penalty of not less than one hundred dollars nor more than five hundred dollars for each day that such failure or neglect is continued. It is the duty of the Board to see that violations are promptly prosecuted and penalties due the state recovered and collected. The Board is required to request the Attorney General to institute proper proceedings to recover penalties.

IV.

In October, 1928, said Board, acting on its own motion, conducted a general inquiry under its Docket No. 1020 into the reasonableness of existing rates on petroleum and petroleum products. Subsequently and on the 18th day of March, 1929, the Board made and filed its report and order No. 1533. In this report existing intrastate rates on petroleum and petroleum products were found unreasonable and an order was made by the Board prescribing a new scale of rates to take effect April 17, 1929. Plaintiffs seek to enjoin defendants from putting into effect and enforcing the new scale of rates.

V.

Montana is an oil-producing state. Crude oil is produced at several points in Montana and there are a number of refineries within the state. These wells and refineries do not take care of the entire domestic consumption. In 1927, for example, the last year for which figures are available, 53,000,000 gallons of gasoline were consumed in the state, of which 33,000,000 gallons were produced in Montana and 20,000,000 gallons in other states. In that same year about 3,000,000 gallons of Montana gasoline were sold outside of the state.

At Greybull and Casper, Wyoming, on the line of the plaintiff, Chicago, Burlington & Quincy Railroad Company, are refineries which ship large quantitites of petroleum products to points in the State of Montana.

Oil produced in California moves by tank steamers to points on the North Pacific Coast and thence by rail to points in Washington, Idaho and Montana.

VI.

Interstate rates and intrastate rates on petroleum and petroleum products in Wyoming, Montana, Idaho and Washington are inter-related and inter-dependent. The existing scale of rates on petroleum and petroleum products in Montana is the so-called Montana distributing scale established in 1922 in the proceeding, *In Re Montana Petroleum Products,* reported in 15 Montana Utility Reports, 36. The scale is based upon the fifth class scale prescribed by the Interstate Commerce Commission in *Portland Chamber of Commerce v. O. R. R. & N. Co.,* 21 I. C. C. 640, in which case the Interstate Commerce Commission fixed a basis of class rates for application from North Pacific Coast terminals, such as Portland, Seattle and Tacoma, to Washington, Idaho and Montana. This class-rate scale has

been prescribed by the Interstate Commerce Commission for application from Portland to California points and recently from Arizona to California and New Mexico and El Paso, Texas.

Existing rates on petroleum and petroleum products from Greybull, Wyoming, to Montana points are on the basis of the Montana distributing scale. Rates from Casper, Wyoming, were established by order of the Interstate Commerce Commission on the basis of the Montana distributing scale as maximum. This was done in the case of *Texas Company v. C. B. & Q. R. R. Co.*, 101 I. C. C. 734.

Rates for the shipment of petroleum and petroleum products within the State of Washington and from points in Washington to points in Idaho and Montana are also the same as the Montana distributing scale.

Any change in the Montana distributing scale would upset a well-established rate structure that covers a number of states and would directly affect rates on interstate commerce. The establishment of an unreasonably low Montana scale would directly burden and discriminate against interstate commerce and would discriminate against localities in adjoining states from which shipments of petroleum and petroleum products are made to points in the State of Montana.

VII.

The existing scale of interstate rates from Casper, Wyoming, to Montana points which, as above stated, is the Montana distributing scale, has been found reasonable by the Interstate Commerce Commission. When the Casper rates were under consideration by that Commission and it was claimed that Casper was being discriminated against because at that time its rates into Montana averaged 22.5¢ higher than rates from Greybull to Montana points, inasmuch as Greybull at that time

did have the benefit of the Montana scale, the Interstate Commerce Commission in *Texas Company v. C. B. & Q. R. R. Co.*, 101 I. C. C. 734, expressly found that the Casper rates were not unreasonable but found that they were prejudicial to Casper and preferential to Greybull. The Montana rates were then put into effect as maxima from Casper to Montana points. This was an authoritative finding by the Interstate Commerce Commission that interstate rates higher than the existing Montana distributing scale were reasonable *per se* and would have been continued in effect if undue discrimination had not been found. This is the only finding of the Interstate Commerce Commission that directly relates to the Montana distributing scale. Lower rates from Great Falls, Lewistown and Miles City refineries to a few consuming points in western South Dakota were established by the Interstate Commerce Commission in *Midcontinent Oil Rates*, 139 I. C. C. 605, but these rates are the result of peculiar competitive conditions that do not exist in the territory under consideration and they are no measure of proper rates for the State of Montana.

VIII.

The general investigation of rates on petroleum and petroleum products by the Montana Board of Railroad Commissioners was not undertaken at the request of any railroad and no testimony was given at the hearing that the present rate relationship was unsatisfactory. The Montana Commission proceeded with complete knowledge and appreciation of the fact that if it lowered the Montana scale of rates, interstate rates would be affected. Shippers of oil from Wyoming to Montana appeared in the investigation and testified that if the Montana scale were lowered they would expect the rates from Wyoming to Montana to be reduced. Since the publication of the Board's

order establishing a lower scale these Wyoming shippers have demanded lower rates from plaintiffs so that they might be on the same competitive basis as Montana producers. Similar rate adjustments will probably be demanded by shippers from North Pacific Coast points.

IX.

The order of the Montana Commission if made effective will establish a scale of rates that averages 29% lower than the existing scale. Compliance with this scale would cut the intrastate revenues of plaintiffs more than $400,000 annually and through resulting depression of interstate rates would lower the total revenues of plaintiffs considerably more.

This order of the Montana Commission is violative of paragraph (4) of Section 13 of the Interstate Commerce Act (Act of Congress of February 4, 1887, as amended by Act of June 18, 1910, and Act of February 28, 1920) which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

X.

In order that the question whether an intrastate rate does in fact discriminate against persons or localities in interstate commerce or against interstate commerce itself may be determined, Congress has provided an orderly procedure before the Interstate Commerce Commission commonly referred to as a Section 13 case (Section 13 of Interstate Commerce Act of February 4, 1887, as amended by Act of June 18, 1910, and Act of February 28, 1920). Plaintiffs have applied to the Inter-

state Commerce Commission to proceed under said Section 13 to determine whether or not said proposed reduced Montana scale does not discriminate against persons and localities in interstate commerce and against interstate commerce, and have alleged in their petition that the proposed scale does discriminate against persons and localities in interstate commerce and does discriminate against interstate commerce, and ask in said petition that the Interstate Commerce Commission institute an early investigation with respect to the matters and things set forth in the petition. The Interstate Commerce Commission will undoubtedly, in accordance with its usual practice, set the matter down for hearing at which time all interested parties can appear and present evidence, and all the facts as to both interstate and intrastate commerce can be submitted to the body which under the Constitution and laws of the United States has authority to determine these questions.

If the new Montana scale is permitted to go into effect April 17, 1929, and continue in effect during the time that will elapse before a decision can be obtained from the Interstate Commerce Commission, which period of time plaintiffs allege will be approximately a year, plaintiffs will suffer irreparable loss and injury if the proposed Montana scale be ultimately found unlawful by the Interstate Commerce Commission. There is no way in which plaintiffs could recover the sums lost because of the unreasonable and unlawful intrastate rates.

To avoid such irreparable loss and damage and to maintain the *status quo* during the time necessary to hear and determine plaintiffs' Section 13 case plaintiffs asked the Montana Commission to suspend the proposed rates and extend the effective date of the Commission's order until the Interstate Commerce Commission has acted. This the Montana Board of Railroad Commissioners late on April 13, 1929, refused to do, although

Section 13 of Chapter 37 of Montana Session Laws, 1907 (Sec. 3794, Revised Codes of Montana, 1921), provides that:

> " * * * and in proper cases, where it appears that the United States Inter-State Commerce Commission Law has been violated, it is hereby made the duty of said Board to make complaint to the Inter-State Commerce Commission of the United States and to aid such Commission in any investigation it may make concerning violations of the United States Law, by furnishing evidence, and in any other manner which may seem best suited to enforce both the United States and State Law, and to protect the interests of the people."

XI.

The defendants threaten and intend after the 17th day of April, 1929, to commence numerous proceedings and prosecutions both for equitable or mandatory or other relief and for a multiplicity of penalties in order to force the plaintiffs and other carriers similarly situated to charge and collect the new scale of rates unless plaintiffs voluntarily file new tariffs and put the new rates into effect. The proceedings contemplated and threatened by said defendants will subject plaintiffs and other carriers similarly situated to multitudinous and vexatious suits both for injunctive or mandatory and other relief and for fines and penalties, and would, if such proceedings be permitted, prevent the plaintiffs, their officers and employes from obeying the mandate of the Interstate Commerce Act against unlawful discriminations and would directly interfere with and burden interstate commerce. Plaintiffs allege that the penalties for failure to put the new rates into effect are so severe as to compel compliance though plaintiffs are convinced such rates will ultimately be found unlawful; that said penalties are so large as to deny plaintiffs the equal protection of the law

and deprive them of their property without due process of law. Plaintiffs allege that they are without adequate remedy at law.

Wherefore, inasmuch as the plaintiffs are remediless by the strict rules of the common law and only relievable in equity, the plaintiffs pray:

That the defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, be required to make full and direct answer to this bill of complaint (but not under oath, answer under oath being expressly waived);

That defendants, Lee Dennis, Daniel Boyle and Leonard C. Young, constituting the Board of Railroad Commissioners of the State of Montana, be enjoined and restrained from putting into effect said Report and Order No. 1533 and the scale of rates provided in the Report and Order of said Board, and that said defendants be required to suspend said rates and any tariffs prescribing said rates;

That defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, be enjoined and restrained from bringing any action or proceeding of any sort whatsoever to enforce said new scale of rates or to hinder or obstruct or prevent the charge and collection by plaintiffs and other carriers similarly situated of the existing scale of rates;

That said defendants be so enjoined and restrained until and only until the Interstate Commerce Commission has determined the Section 13 case brought by plaintiffs herein unless it be determined in said proceeding by the Interstate Commerce Commission that the proposed scale of rates would unlawfully discriminate against interstate commerce or persons or localities in interstate commerce and direct the establishment or permit the establishment of intrastate rates on a higher basis than the proposed scale, in which event plaintiffs pray that said defendants be perpetually enjoined and restrained from

enforcing the scale of rates provided in said Order No. 1533;

That a temporary restraining order be issued during the pendency of this action restraining the defendants and each of them as prayed;

That plaintiffs have such other and further relief in the premises as the nature of the case shall require and to Your Honors shall seem meet; and may it please Your Honors to grant also to plaintiffs a writ of subpoena to be directed to said defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, and each of them, commanding them and each of them to appear and make answer to plaintiffs' bill of complaint at a certain time and to abide the further order of the court.

Dated April 13th, 1929.

NORTHERN PACIFIC RAILWAY COMPANY,
By F. J. GEHAN,
M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

GREAT NORTHERN RAILWAY COMPANY,
By W. L. CLIFT,
R. J. HAGMAN,
Solicitors.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
By MURPHY & WHITLOCK,
HOWARD TOOLE,
Solicitors.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

STATE OF MINNESOTA,
County of Ramsey.—ss.

B. W. SCANDRETT, being duly sworn, deposes and says he is Vice President of the Northern Pacific Railway Company, one of the plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

B. W. SCANDRETT.

Subscribed and sworn to before me
this 13th day of April, 1929.

G. T. C. PETERSON,
Notary Public, Ramsey County, Minnesota.
My commission expires Oct. 21, 1935.
(Notarial Seal)

Filed April 15, 1929.
C. R. GARLOW, Clerk.
By H. H. WALKER, Deputy.

EXHIBIT B.

BEFORE THE INTERSTATE COMMERCE COMMISSION

IN THE MATTER OF RAILROAD FREIGHT RATES FOR THE MOVEMENT OF PETROLEUM AND PETROLEUM PRODUCTS INTRASTATE IN MONTANA.

Petition
under Section 13 of
the
Interstate Commerce Act.

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1. Your petitioners, Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railway Company; Great Northern Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; and Northern Pacific Railway Company, bring this petition in their own behalf and on behalf of all steam railroads who are engaged in the transportation of freight in intrastate commerce in the state of Montana, and allege

2. Petitioners are all common carriers of freight and passengers within the state of Montana and are engaged in transporting such freight and passengers, including petroleum and petroleum products intrastate between points in the state of Montana, and interstate between points in the state of Montana, and points in other states and between points in the state

of Montana and points in foreign countries, and are all subject to the Interstate Commerce Act and to the Transportation Act of 1920. This petition is filed under Section 13 of the Interstate Commerce Act.

3. On July 20, 1928, the Board of Railroad Commissioners of the state of Montana, being the board having jurisdiction over such matters under the laws of Montana, instituted a proceeding before said Board against the above named petitioners entitled "In the Matter of Rates on Petroleum and Petroleum Products" and bearing Docket No. 1020 of the said Board, for a general investigation of rates charged for the transportation of petroleum and petroleum products by rail between points within the state of Montana. Evidence was heard in said proceeding by the said Board on October 4, 5, and 6, 1928, and on the 19th day of March, 1929, the said Board entered an order in said proceeding directing petitioners to substantially reduce practically all of the rates under investigation, a copy of essential portions of said order being hereunto attached and marked Exhibit "A", said reductions to become effective on April 17, 1929. The said rates as so reduced will cause undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, and will cause undue, unreasonable and unjust discrimination against interstate and foreign commerce.

4. There is a heavy volume of traffic in petroleum and petroleum products by rail over the lines of your petitioners in Montana consisting of the movement of crude oil from wells located in both Montana and Wyoming to refineries in Montana and of refined petroleum and petroleum products from refineries located in both Montana and Wyoming to consuming points

in Montana. This constitutes almost the entire traffic in petroleum and petroleum products destined to points in Montana, there being only a small traffic originating in Washington, California and the Mid-Continent or other oil fields. From one-third to two-thirds of the refined petroleum consumed in Montana originates in Wyoming refineries and a substantial percentage of the crude oil refined in Montana refineries originates in Wyoming. There is no substantial movement of crude petroleum from points in Montana to points outside the state. The movement of petroleum products from Montana points to points outside the state is relatively small as compared with the total volume of the traffic.

5. Subject to maximum rates which modify both scales to a slight extent in certain instances, the rates on refined petroleum now are and until the said order of said Board of Railroad Commissioners of Montana goes into effect, will continue to be the same in cents per hundred pounds for equal distances on movements to consuming points in Montana whether moving interstate from refineries in Wyoming or other points of origin in Wyoming or Washington, or intrastate from refineries in Montana. The intrastate rates are published in the following tariffs:

Great Northern Railway Company, G. F. O. 1957-D, Montana Railroad Commission 341.

Northern Pacific Railway Company, Tariff No. 3409-B, Montana Railroad Commission 629.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, G. F. D. 14500-B, Montana Railroad Commission 159.

Butte, Anaconda & Pacific Railway Tariff No. 68, Montana Railroad Commission 57.

Chicago, Burlington & Quincy Railroad Company, G. F. O. 14730-D, Montana Railroad Commission 245.

Oregon Short Line Railroad Company, Tariff No. 3281-D, Montana Railroad Commission 119.

White Sulphur Springs & Yellowstone Park Railway Tariff No. 1-G, Montana Railroad Commission 22.

Montana, Wyoming & Southern Railroad Company Tariff No. 16, Montana Railroad Commission 14.

Minneapolis, St. Paul and Sault Ste. Marie Railway Company G. F. D- 32-A, Montana Railroad Commission 34.

The interstate rates from Wyoming are carried in Chicago, Burlington & Quincy Railroad Company tariff I. C. C. No. 17054. The interstate rates from Washington are carried in Agent Henry's tariff I. C. C. No. 180. Intrastate rates upon low grade oil are published in the same Montana tariffs and are on a basis of 75 per cent of the refined petroleum rates for the great bulk of the movement. Interstate rates on low grade oils from Wyoming to Montana are published in Chicago, Burlington & Quincy Railroad Company tariff I. C. C. No. 17054 and are in general somewhat higher than the Montana intrastate rates for the same distance and more closely approximate the interstate rates on refined petroleum. Rates on crude oil both intrastate and interstate are arbitrary point to point commodity rates which have been established with a view to permitting the movement of crude oil from the producing wells to the refineries and in many instances rates to the same refinery from wells located in both Montana and Wyoming are so related as to permit the refinery to obtain crude oil from either source. The rates on refined petroleum from refining and distributing points in Wyoming, Washington and Oregon

to destinations in Montana and rates from Montana refineries to many destinations in northern Idaho, Washington and Oregon as well as the present intrastate rates within Montana are the Fifth class rates in effect as of May 25, 1918, subjected to the general increase and decrease of General Order No. 28 (as modified by Freight Rate Authority No. 96) of the United States Railroad Administration, the decision of the Interstate Commerce Commission in Ex Parte 74 and the general reduction ordered by the Interstate Commerce Commission in "Reduced Rates 1922", and corresponding action by the Montana Railroad Commission. The Fifth Class rates in effect on May 25, 1918, were a part of the class scale prescribed by the Interstate Commerce Commission in *Portland Chamber of Commerce v. O. R. & N. Co.,* 21 I. C. C. 640, commonly known as the Portland backhaul scale. Practically the same scale was prescribed by the Interstate Commerce Commission in *Klamath County Chamber of Commerce v. Southern Pacific Co., et al.,* 74 I. C. C. 207. In *Arizona Corporation Commission v. A. E. Ry. Co.,* 142 I. C. C. 61, the Interstate Commerce Commission prescribed rates applicable on standard lines between Arizona on the one hand and points in California, New Mexico and El Paso, Texas, based upon the same scale. In *Utah Shippers' Traffic Ass'n. v. C. M. St. P. & P. Ry. Co. et al.,* 147 I. C. C. 581, the Interstate Commerce Commission prescribed the last named scale for application from Salt Lake City to destinations in Montana, Idaho and Washington. The Portland backhaul scale was further approved by the Interstate Commerce Commission in *Revision of Class Rates West of the Cascades,* 64 I. C. C. 159, and in *Class Rates Between Points in Washington and Oregon,* 128 I. C. C. 108.

6. The order of the Board of Railroad Commissioners of the State of Montana, referred to in paragraph 3 hereof, if

allowed to become effective will reduce all intrastate rates on refined petroleum in Montana from refineries to points of consumption from 28 to 30 per cent, thus placing them from 28 to 30 per cent lower in cents per hundred pounds for hauls of the same length than the interstate rates from Wyoming and Washington points of origin. Reductions to the same extent are ordered in Montana intrastate rates on low grade oils which, as stated above, are already somewhat below the interstate rates from origin points in Wyoming on the same commodities. On crude oil moving intrastate in Montana, the said order will have the effect of reducing existing rates from Montana producing points from 10 to 28 per cent.

7. The said reductions will cause undue and unreasonable advantage and preference to Montana producers and refiners and to Montana localities engaged in intrastate commerce, and an undue and unreasonable prejudice to producers and refiners and to localities engaged in interstate commerce in that the former will enjoy substantially lower rates for hauls of similar commodities for the same distances under substantially similar conditions. Said reductions will tend to prevent the movement of petroleum and petroleum products from Wyoming and Washington to Montana points in competition with similar products moving at lower rates for the same distances intrastate in Montana. By facilitating the marketing of Montana petroleum products within the state as compared with marketing the same products outside the state, said reductions will tend to prevent the movement of such products in interstate commerce from points in Montana to points in other states and will tend to displace similar products now moving in interstate commerce from points outside the state for marketing in Montana. The maintenance of rates from Montana shipping points

to destinations in Montana near the state boundary line lower than the rates from the same shipping points to destinations on the same line of railroad lying just across the state boundary and just outside the state of Montana will constitute an undue and unreasonable advantage and preference to the persons and localities located just within the state and an undue and unreasonable prejudice to the persons and localities engaged in interstate commerce and located just outside the state and will result in some instances in defeating the lawful interstate rates and in destroying interstate commerce by causing shipments destined to the interstate destinations to be billed to the nearest intrastate destination and then moved across the state line by truck or other means.

8. In valuing the property of petitioners and other interstate railroad carriers for rate-making purposes, the Interstate Commerce Commission has not separated property devoted to the purposes of interstate transportation from property devoted to intrastate transportation, but has made one lump sum valuation, and in fixing rates necessary to give carriers a fair return on such valuation, the Commission has made no separation between interstate revenue and intrastate revenue and no separation between expenses for handling interstate traffic and expenses for handling intrastate traffic, but has fixed rates for interstate traffic upon a level which was designed, with the revenue accruing from intrastate traffic, to yield no more than was necessary to permit the carriers to earn a lawful return upon the value of their property held for and used in the service of transportation. At the time of the advances in interstate rates under orders of the United States Railroad Administration and under Ex Parte 74, corresponding advances were made in Montana intrastate rates, and the advances required by the Railroad Administration and in Ex Parte 74 were only

what were required in conjunction with corresponding advances in intrastate rates. The reductions in intrastate petroleum rates which have now been ordered by the Board of Railroad Commissioners of Montana will more than remove all of the increases which were made in such rates by order of the Director General of Railroads and under Ex Parte 74 and will leave the single-line rates lower in cents per hundred pounds than they were on May 25, 1918, for all distances of 100 miles or over. Based upon the volume of traffic moving in 1928, the loss of revenue to petitioners on Montana intrastate traffic resulting from said reductions will be between $400,000 and $500,000 per year. If said reductions are maintained in effect, petitioners will be compelled to make similar reductions in corresponding interstate rates which will result in a very much greater loss of revenue to petitioners. Neither the petitioners themselves nor the railroads in the rate group to which petitioners belong have been earning under existing rates nor will they earn in the immediate future under a continuation of existing freight rates, the rate of return upon the value of their property prescribed by law and by order of this Commission. The proposed reduction of Montana intrastate rates and the loss of revenue resulting therefrom would require an increase in interstate rates of petitioners and other carriers in said rate group, in order to compensate for such loss of revenue and in order to even approximate the rate of return prescribed by law.

9. The cost and expense of transporting petroleum and petroleum products between stations in the state of Montana is as great as or greater per mile than the cost and expense of transporting petroleum and petroleum products in interstate commerce to and from stations in Montana and the transportation conditions in intrastate commerce and in interstate com-

merce are similar and at least equally favorable to interstate commerce.

10. The interstate rates hereinabove referred to are just and reasonable and comply with the requirements of Section 1 of the Interstate Commerce Act. The existing Montana intrastate rates herein referred to are and for the future would be just and reasonable rates for the service covered thereby and the proposed reductions hereinabove referred to would result in rates which would be unjustly and unreasonably low for the service to be performed. Said existing intrastate rates are the minimum rates which should hereafter be charged for the movement intrastate of petroleum and petroleum products in Montana.

To the end, therefore, that the said undue and unreasonable advantages, preferences, prejudices and discriminations as between intrastate and interstate commerce may be removed and prohibited, your petitioners pray on their own behalf and on behalf of all steam railroads engaged in the transportation of passengers in intrastate and interstate commerce in the state of Montana, that this Honorable Commission institute an early investigation with respect to the matters and things herein set forth and that due notice thereof be given to the State of Montana and that an order be entered declaring discriminatory, the intrastate freight rates on petroleum and petroleum products within the State of Montana referred to in the said order of the Board of Railroad Commissioners of Montana, insofar as and to the extent that the same are lower than the corresponding rates for similar interstate movements; and that this Commission, by proper order, terminate and prohibit such discriminations and preferences by prescribing the rates, fares and charges to be charged by the petitioners and other railroads

operating in Montana for the movement of petroleum and petroleum products intrastate within said state.

Your petitioners further pray for such other additional and general relief in the premises as to this Commission may seem right and proper.

Respectfully submitted,

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY COMPANY,
GREAT NORTHERN RAILWAY COMPANY,
MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
NORTHERN PACIFIC RAILWAY COMPANY.

By BRUCE SCOTT,
H. H. FIELD,
H. S. MITCHELL,
D. F. LYONS,
F. G. DORETY,
M. L. COUNTRYMAN, JR.,
R. J. HAGMAN,
Their Attorneys.

Dated April 13, 1929.

P. O. Address,
1120 Great Northern Bldg.,
St. Paul, Minn.

EXHIBIT "A"

Essential portions of Order of Board of Railroad Commissioners of the State of Montana dated March 19th, 1929, in Docket No. 1020, Report and Order No. 1533 in re Montana Petroleum Rates.

Distance rates as herein prescribed on crude oil are to be published as specific commodity rates from known points of production. In other words, full publication of such rates need not be made but carriers shall be required to readjust all existing rates in conformity therewith.

The record discloses no opposition to the establishment of identical rates from Kevin and Sunburst, and the applicable rates under the prescribed scale shall be predicated on the average distance.

Carriers should establish on refined petroleum products through routes and joint rates via all reasonably available direct routes.

FINDINGS.

Upon all the facts of record we conclude and find:

1. That the present rates on refined petroleum products, excepting crude, fuel, gas, and smudge oils, and liquid asphalt, from Billings, Butte, Great Falls, Kalispell, Kevin, Lewistown, Miles City, Missoula, Shelby, Sunburst, and West Lewistown for the future will be unreasonable to the extent that they exceed the rates set forth in Appendix A.

2. That the present rates on crude (excepting traffic from producing fields to refineries), fuel, gas and smudge petroleum

oils, and liquid asphalt, for the future will be unreasonable to the extent that they exceed 75 per centum of the rates prescribed on refined oils as set forth in Appendix A.

3. That the present rates on crude petroleum oil from Conrad, Coombs, Kevin, Sunburst, and Winnett to refining points of destination for the future will be unreasonable to the extent that they exceed the rates set forth in Appendix B.

An appropriate order will be entered.

APPENDIX A.

RATES FOR SINGLE-LINE HAUL

Miles.	Rate.	Miles.	Rate.	Miles.	Rate.
5	7	130	27	380	43
10	10	140	28	400	44
15	11	150	29	420	45
20	12	160	30	440	46
25	13	170	31	460	47
30	14	180	32	480	48
35	15	190	33	500	49
40	16	200	34	520	50
45	17	210	35	540	51
50	18	220	35	560	52
55	19	230	36	580	53
60	20	240	36	600	54
65	20	250	37	620	55
70	21	260	37	640	56
75	21	270	38	660	57
80	22	280	38	680	58
85	22	290	39	700	59
90	23	300	39	720	60
95	23	310	40	740	60
100	24	320	40	760	61
110	25	340	41	780	61
120	26	360	42	800	62

Joint-line rates will be computed by the addition of the following differentials to the single-line rates:

TWO-LINE HAUL		THREE-LINE HAUL	
1 to 200 miles	3¢	1 to 200 miles	4¢
201 to 350 miles	2¢	201 to 300 miles	3¢
351 to 500 miles	1¢	301 to 400 miles	2¢
Over 500 miles	0	401 to 500 miles	1¢

Crude Oil from Conrad, Coombs, Kevin, Sunburst and Winnett to refining points.

APPENDIX B.

RATES FOR SINGLE-LINE HAULS

Miles.	Rate.
10	6
20	7
30	8
50	9
70	10
90	11
110	12
130	13
150	14
170	15
190	16
210	17
230	18
250	19
280	20
310	21
340	22
370	23
400	24
440	25
480	26
600	27
700	28

Joint-line rates will be computed by the addition of the following differentials to the single-line rates:

TWO-LINE HAULS		THREE-LINE HAULS	
1 to 251 miles	2¢	1 to 250 miles	3¢
251 to 500 miles	1¢	251 to 400 miles	2¢
Over 500 miles	0	401 to 500 miles	1¢
		Over 500 miles	0

ORDER.

At a session of the Board of Railroad Commissioners of the State of Montana, held in its office in the Capitol at Helena, on the 18th day of March, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came before the Board for final action the matters and things involved in Docket No. 1020, and it appearing that the Board of Railroad Commissioners of the State of Montana has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all the matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Board being fully advised in the premises;

IT IS ORDERED, That the Butte, Anaconda & Pacific Railway Company; Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Great Northern Railway Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Montana, Wyoming & Southern Railroad Company; Northern Pacific Railway Company; Oregon Short Line Railroad Company; and White Sulphur Springs & Yellowstone Park Railway Company, respondents, according as they participate in the transportation, be, and they are, and each of them is, hereby notified and required to establish, on or before the 17th day of April, 1929, and thereafter to maintain and apply to the transportation of petroleum and petroleum products, in carloads, from the various points specified in the findings of the report herein, rates per 100 pounds which shall not exceed the rates or basis of rates set forth in such findings and the appendixes therein referred to and attached to said report.

IT IS FURTHER ORDERED that one or more carriers having indirect single or joint routes to common points of destination reached by one or more direct single or joint lines may meet the rates established by such direct line or lines, but such rates shall not be exceeded at directly intermediate points.

IT IS FURTHER ORDERED that the secretary shall serve a true copy of this report and order upon each of the parties hereto and that the same shall be in full force and effect according to its terms.

DANIEL BOYLE,
Chairman.

LEONARD C. YOUNG,
Commissioner.

LEE DENNIS,
Commissioner.

Being and constituting the Board of Railroad Commissioners of the State of Montana.

ATTEST: OFFICIAL
FRANCIS A. SILVER,
Secretary.

(Seal)

EXHIBIT C.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
..... DIVISION

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Now come the plaintiffs above named and, at the time of the presentation to the Court of their bill of complaint filed herein, move the Court for a temporary injunction pending the determination of the action restraining the defendants and each of them as prayed for by the plaintiffs in their bill of complaint.

And request the presiding Judge of this Court to convene three judges to hear such application for a temporary injunction as provided by statute.

Plaintiffs further move the presiding Judge of this Court to grant a temporary restraining order pending the convening of the three said judges and restraining the defendants, and each of them pending the hearing and determination by said three judges, from the commission of any of the acts threatened by them and described in plaintiffs' bill of complaint.

Dated April 15, 1929.

NORTHERN PACIFIC RAILWAY COMPANY,
By F. J. GEHAN,
M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

GREAT NORTHERN RAILWAY COMPANY,
By W. L. CLIFT,
R. J. HAGMAN,
Solicitors.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
By MURPHY & WHITLOCK,
HOWARD TOOLE,
Solicitors.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

Filed April 15, 1929.
C. R. GARLOW, Clerk.
By H. H. WALKER, Deputy.

EXHIBIT D.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
..... DIVISION

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

VS.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

TEMPORARY RESTRAINING ORDER.

The plaintiffs having filed their verified bill of complaint in the above entitled case praying that the defendants be enjoined from putting into effect the report and order No. 1533 dated March 18, 1929, of the Board of Railroad Commissioners of the State of Montana in Docket No. 1020 and the new scale of rates on petroleum and petroleum products prescribed in said report and order, and from bringing any action or proceeding to en-

force said order and scale of rates, or to hinder or prevent plaintiffs from charging and collecting the existing scale of rates, and plaintiffs having presented to the undersigned District Judge of the United States District Court their application for an interlocutory injunction on the ground that said report and order are in conflict with the Commerce Clause and the Fourteenth Amendment of the Federal Constitution and the Act to Regulate Commerce, and having requested the undersigned Judge of the United States District Court as provided by statute to call to his assistance two other judges to hear and determine said application, and having requested that a temporary restraining order be issued pending the hearing and determination of the application for an interlocutory injunction, and it now appearing that irreparable loss and damage would result to the plaintiffs unless such temporary restraining order be granted in that the plaintiffs and other railway companies similarly situated would be complying with said report and order be deprived of their property and a burden be placed upon interstate commerce and localities and persons in interstate commerce, or by failure to comply with said report and order the plaintiffs and other railway companies similarly situated and agents, officers and employes would be subjected to multitudinous suits, both for injunctive and mandatory or other relief and for fines and penalties and it appearing further that if such temporary restraining order is not granted said plaintiffs will be injured in the manner above stated and this temporary restraining order should be granted without notice for the reason that otherwise plaintiffs will be required to establish and maintain the reduced rates ordered by the said Board on the 17th day of April, 1929, and suffer the irreparable damage above referred to before notice could be given of the application for a temporary restraining order.

IT IS THEREFORE HEREBY ORDERED that the said Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle and Leonard C. Young, as members of said Board and each of them, be temporarily restrained until the plaintiffs' application for an interlocutory injunction be heard and determined by three judges, as provided by statute, from putting into effect said report and order No. 1533 and the scale of rates provided in said report and order, and that said defendant L. A. Foot, as attorney General of the State of Montana, be similarly temporarily restrained from bringing any action or proceeding of any sort whatsoever to enforce said new scale of rates, or to hinder or obstruct or prevent the charge and collection by plaintiffs and other carriers similarly situated of the existing scale of rates on petroleum and petroleum products within the State of Montana;

IT IS FURTHER ORDERED that a copy hereof be served upon each of the defendants and that from and after the date of service each and all of said defendants shall observe and comply herewith;

AND IT IS FURTHER ORDERED that this temporary restraining order shall become effective as to the plaintiffs herein upon the filing of bonds in favor of the United States of America, as follows, to-wit:

By the Northern Pacific Railway Company in the penal sum of Fifteen Thousand ($15,000.00) dollars;

By the Great Northern Railway Company in the penal sum of Fifty Thousand ($50,000.00) dollars;

By the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the penal sum of Thirty Thousand ($30,000.00) dollars; and

By the Chicago, Burlington & Quincy Railroad Company in the penal sum of Ten Thousand ($10,000.00) dollars; and any

other carrier similarly situated, upon the filing of a bond in the penal sum of Ten Thousand ($10,000.00) dollars, such bonds to be conditioned that the plaintiffs, or other carriers, shall pay all damages caused by it by reason of the issuance of this order in the event it should eventually be decided that said order was unlawfully issued.

Dated at Great Falls, Montana, this 15th day of April, 1929.

CHARLES N. PRAY,
District Judge of the United States.

Filed at 4 P. M. April 15, 1929.
C. R. GARLOW, Clerk.
By H. H. WALKER, Deputy.

EXHIBIT E.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION.

IN EQUITY NO. 692.

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

MOTION TO DISMISS BILL OF COMPLAINT.

Come now the Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle and Leonard Young, as members of and constituting said Board of Railroad Commissioners of the State of Montana, and L. A. Foot, as Attorney General of the State of Montana, defendants above-named, and move the Court to dismiss the bill of complaint on file herein on the grounds and for the reasons that the said Bill of Com-

plaint does not state facts sufficient to constitute a valid cause of action, in equity, or at all.

L. A. FOOT,
Attorney General of the State of Montana,
residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana,
residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 6th day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Attorneys for Northern Pacific Ry. Co., and
Chicago, Burlington & Quincy R. Co.

Filed May 6, 1929.
C. R. GARLOW, Clerk.
By H. L. ALLEN, Deputy.

EXHIBIT F.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION.

IN EQUITY NO. 692.

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER.

Come now the Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle, and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners of the State of Montana, and L. A. Foot, as Attorney General of the State of Montana, and move the court to

dissolve and set aside the Temporary Restraining Order issued and filed in the above entitled court and cause on April 15, 1929, on the grounds and for the following reasons, to-wit:

I.

The Bill of Complaint herein, upon the allegations of which said Temporary Restraining Order was issued, does not state facts sufficient to constitute a valid cause of action in equity, or at all.

II.

The Bill of Complaint herein is not verified as required by Rule No. 25 of the Equity Rules promulgated for all Federal Courts by the Supreme Court of the United States, in that said Bill of Complaint is verified in part upon information and belief.

III.

That the above-entitled court did not at the time of the issuance of the said Temporary Restraining Order, or at any other time, or at all, set the matter of the issuance of a preliminary injunction down for hearing at a date within ten days from date of issuance of said order, to-wit: April 15, 1929, as required by Rule No. 73 of the Equity Rules promulgated for all Federal Courts by the Supreme Court of the United States.

IV.

That the above-entitled court did not at the time of the issuance of said Temporary Restraining Order, or at any other time, or at all, set the matter of the issuance of a preliminary injunction down for hearing at a date certain as is required by

Section 718, Revised Statutes of the United States, as amended, (28 U. S. C. A. 381).

V.

That the above-entitled court did not at the time of the issuance of said Temporary Restraining Order, or at any other time, or at all, issue an order requiring the defendants or either of them to show cause before the Court why a preliminary injunction should not be granted and that without the issuance of such an order to show cause the above court was without authority to issue the aforesaid Temporary Restraining Order.

VI.

That the portion of the Temporary Restraining Order restraining the defendants and each of them from putting into effect Report and Order No. 1533 "until the plaintiffs' appliation for an interlocutory injunction may be heard and determined by three judges, as provided by statute", is in excess of jurisdiction and void in that the same is contrary to the provisions of Section 718, Revised Statutes of the United States, as amended, (28 U. S. C. A. 381).

VII.

That no extension of the terms of the Temporary Restraining Order has been granted by the above-entitled court for good cause shown or at all and more than ten days has elapsed since the issuance and entry of said Temporary Restraining Order.

This motion is based upon the records, files, and minutes of the court in the above-entitled cause.

Dated at Helena, Montana, this sixth day of May, 1929.

L. A. FOOT,
Attorney General of the State of Montana,
residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana,
residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 6th day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Solicitors for Northern Pacific Ry. Co., and
Chicago, Burlington & Quincy R. Co.

Filed May 6, 1929.
C. R. GARLOW, Clerk.
By H. L. ALLEN, Deputy.

EXHIBIT G.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION.

EQUITY NO. 692.

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA and LEE DENNIS, DANIEL BOYLE, and LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

NOTICE OF HEARING UPON MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER.

To the Northern Pacific Railway Company,
Great Northern Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and
Chicago, Burlington and Quincy Railroad Company,
plaintiffs above-named, and their respective attorneys:

You, and each of you, will please take notice that the motion of the defendants herein to dissolve the temporary restraining

order, issued and filed in the above-entitled court and cause on April 15, 1929, has been set down for hearing, and will be heard before the Honorable Geo. M. Bourquin, Judge of the above-entitled court, at the Court House, Federal Building, Butte, Montana, on Tuesday, the 28th day of May, 1929, at the hour of 9:30 o'clock A. M.

Dated at Helena, Montana, this 23d day of May, 1929.

L. A. FOOT,
Attorney General of the State of Montana, residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana, residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing Notice of Hearing upon Motion to Dissolve Temporary Restraining Order, and receipt of a copy thereof acknowledged this 23 day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Attorneys for Northern Pacific Railway Company, and Chicago, Burlington & Quincy Railroad Company.

Filed May 24, 1929.
C. R. GARLOW, Clerk.
By H. L. ALLEN, Deputy.

EXHIBIT H.

UNITED STATES DISTRICT COURT, MONTANA.

NORTHERN PACIFIC RY. CO., et al.,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS, et al.,

Defendants.

No. 692.

The four railways plaintiffs in their complaint so far as vital allege that defendants ordered certain intrastate freight rates reduced 29% and which would reduce plaintiffs' revenues more than $400000 annually; that the change will "upset a well-established rate-structure ..... and would directly affect rates on interstate commerce. The establishment of an unreasonably low Montana scale would directly burden and discriminate against interstate commerce and would discriminate against localities in adjoining states"; that the order "is violative of paragraph 4 of Section 13 of the Interstate Commerce Act, which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce"; that plaintiffs have applied to the Interstate Commerce Commission to determine whether or not the reduced rates "does not discriminate", and in their petition have alleged "that the proposed scale does discriminate"; that if the Commission determines that the proposed scale is "unlawful", plaintiffs in the mesne time will suffer irreparable

loss and injury unless the status quo be maintained by injunction.

Although presented to the court two days before the defendants' order became effective, no notice of the application for a temporary restraining order was given, but such order issued.

Defendants now move to dismiss the complaint and to dissolve the order, for that amongst other grounds the complaint does not state sufficient facts to constitute a valid cause of action in equity. That it does not is very clear.

The statute (paragraph 4, Section 13, Title 49, U. S. C. A.) forbids not burdens and discriminations in respect to interstate commerce and localities, but only *"undue, unreasonable* or *unjust* discrimination"; and the latter differ from the former as night from day, as unlawful from lawful.

Reading the complaint in the light of common sense as well as settled rules of pleading, it is plain the plaintiffs plead no facts disclosing and make no charge that the proposed scale will cause any the discrimination by the statute forbidden. That plaintiffs will lose revenue and interstate rates require readjustment, may be the consequence of any intrastate reduction, however lawful as they are presumed to be.

Those who would procure from this court an injunction to paralyze the official arm of a sovreign state, must in pleading and proof make it plain that they are entitled to such an extraordinary and drastic remedy; and even railroad companies must proceed as the statute directs, must comply with vital rules of pleading. Not inference, intimation or suggestion will suffice, but only direct and definite averment.

The allegation that the order "is violative" of the statute is the pleaders' mere legal conclusion without any facts alleged to support it.

As the motion to dismiss must be granted, other aspects of the suit argued, need no present consideration. Dismissed.

May 31, 1929.

BOURQUIN, J.

Filed May 31, 1929.
C. R. GARLOW, Clerk.
By L. R. POLGLASE, Deputy.

EXHIBIT I.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MONTANA.

No. 692, Northern Pacific Ry. Co. et al. vs. Board of Railroad Commissioners, et al.

This cause came on regularly for hearing this day on defendants' motion to dissolve the temporary restraining order herein, M. S. Gunn, Esq., appearing for the plaintiffs, and F. A. Silver, Esq., appearing for the defendants. Thereupon the motion was duly argued and submitted and by the court taken under advisement, a memo of authorities being filed and submitted by the plaintiffs.

Entered in open court this 28th day of May, 1929.

C. R. GARLOW, Clerk.

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FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1929.

Original . No. 21.

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND MOTION TO AMEND.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND MOTION TO AMEND.

STATEMENT OF CASE AND GROUNDS ON WHICH JURISDICTION IS INVOKED.

On June 10, 1929, petitioners herein lodged with the Clerk of this Court their motion for leave to file a petition for a writ of mandamus against the Honorable George M. Bourquin, District Judge, and the District Court of the United States

for the District of Montana. Subsequently they lodged with the Clerk a motion for leave to amend and supplement their petition. The facts relied upon to support the motion for leave to file are set out in detail in the petition and in the motion to amend. They may be summarized as follows:

On March 18, 1929, the Board of Railroad Commissioners of Montana filed its Report and Order No. 1533 in its Docket No. 1020, to take effect April 17, 1929, prescribing a new scale of intrastate rates on petroleum and petroleum products averaging 29 per cent lower than the existing scale. This order, if made effective, would reduce petitioners' intrastate revenues more than $400,000 annually, and through resulting depression of interstate rates would reduce petitioners' total revenues considerably more. Believing the order of the Montana Commission to be violative of paragraph (4) of Section 13 of the Interstate Commerce Act, which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, petitioners filed on April 15, 1929, a bill of complaint in the District Court of the United States for the District of Montana against the Board of Railroad Commissioners and the Attorney General to enjoin the enforcement of the order of the Montana Commission. In this bill petitioners alleged it was a suit arising under the Constitution and laws of the United States, particularly under the Commerce Clause of the Constitution and the Fourteenth Amendment thereof, and the Act of Congress known as the Interstate Commerce Act; set forth facts and circumstances to substantiate their claim that the order of the Montana Commission violated Section 13 of the Interstate Com-

merce Act; alleged that they had brought a proceeding before the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act; alleged facts showing that irreparable loss and damage would be incurred by them if they were compelled to charge the lower scale during the time necessary for the Commission to complete an investigation under Section 13, approximately a year; alleged that the penalties prescribed by Montana law for failure to observe the orders of the Montana Commission are so excessive as to deny plaintiffs the equal protection of the law; alleged that defendants threaten and intend to commence numerous proceedings both for equitable relief and for penalties to compel petitioners to obey the order of the Montana Commission; and prayed that the defendants be enjoined until the Interstate Commerce Commission might determine the case brought by petitioners under Section 13 (Motion for Leave to File, p. 14).

At the same time that the bill of complaint was filed there was also filed and presented to the Honorable Charles N. Pray, one of the District Judges of the United States for the District of Montana, a motion for an interlocutory injunction, an application for the convening of a court of three judges to hear the motion, and also a motion for a temporary restraining order (Motion for Leave to File, p. 42). The motion for a temporary restraining order, effective "until the plaintiffs' application for an interlocutory injunction be heard and determined by three judges, as provided by statute", was granted (Motion for Leave to File, p. 44). This temporary restraining order was served upon the defendants and upon the governor of the state of Montana. On May 6 defendants filed a motion to dismiss the bill of complaint (Motion for Leave to File, p. 48), and also a motion to dissolve the temporary restraining order (p. 50). On May 31, 1929, over petitioners' protest that

he lacked jurisdiction to act in the case, the motion to dissolve the restraining order (but not the motion to dismiss) was brought on for hearing before Honorable George M. Bourquin, District Judge of the United States for the District of Montana, who dismissed the bill.

On June 10 petitioners lodged with the Clerk of this Court their motion for leave to file petition for writ of mandamus. On June 12 a suit was instituted by the State of Montana against petitioners in a state court and a temporary restraining order was issued directing petitioners to observe the order of the Montana Commission that District Judge Pray's temporary restraining order protected them in not observing. On June 13, 1929, Mr. Justice Van Devanter made an order reinstating the temporary restraining order granted by District Judge Pray and continued the order in full force until the first motion day of the October term, 1929, of this Court and until the petition for mandamus is disposed of by this Court. On receipt of a certified copy of the order of Mr. Justice Van Devanter the State of Montana dismissed the case which it had pending in state court. On July 2 petitioners again applied to the District Court of Montana and to each of its judges to convene a court of three judges to hear petitioners' application for an interlocutory injunction, calling attention in their petition to the order of Mr. Justice Van Devanter and the provision in it that it was made without prejudice to the power and authority of the District Court when three judges were sitting conformably to Section 380 of Title 28 of the United States Code to hear the application for an interlocutory injunction. On August 6, 1929, District Judge Bourquin filed a written decision and opinion denying the motion to convene a three-judge court. District Judge Pray has failed to take any action since issuing his temporary restraining order. As above stated,

petitioners subsequently lodged with the Clerk of this Court a motion to amend their petition by formally making District Judge Pray a party respondent and to supplement their petition by setting forth steps taken in the litigation on and subsequent to June 13. The facts stated in this paragraph are set out in petitioners' motion for leave to amend.

The statutory provisions on which the jurisdiction of this Court to issue a writ of mandamus is invoked are: Section 380, Title 28, United States Code, which prescribes the procedure in a District Court of the United States in a case arising under Section 380 in which it is claimed that a statute of a state or an order of an administrative board or commission is unconstitutional and an interlocutory injunction is sought to restrain state officers from enforcing such statute or administrative order, and Sections 342 and 377, Title 28, United States Code, which confer power upon this Court in proper case to issue a writ of mandamus. The cases which sustain the jurisdiction of the Court are:

Ex parte Metropolitan Water Co., 220 U. S. 539,
Cumberland Tel. Co. v. Public Serv. Com., 260 U. S. 212,
Ex parte Williams, 277 U. S. 267,
Ex parte Collins, 277 U. S. 565.

ARGUMENT.

There can be no doubt but that the bill of complaint filed by petitioners sets forth a case under Section 380, Title 28, United States Code. All the elements necessary to such a suit are there and it would be useless repetition to refer again to the bill. Its contents are summarized above and it is set out *in extenso* as an exhibit to the petition for mandamus (Motion for Leave to File, p. 14). It is a suit against state officers to enjoin them from enforcing an administrative order on the ground that it and certain statutes of the state are unconstitutional.

This Court has stated in the plainest possible language the duty of a district judge in a Section 380 case. In *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 544, this Court said:

> "We say the hearing should have been had as just stated because it results from the text of the applicable section of the act that limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are, *a*, to receive an application for an interlocutory injunction in the character of case stated in the section; *b*, within the period specified in the section to grant a temporary restraining order 'if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted;' and *c*, to 'immediately call to his assistance to hear and determine the application (for an interlocutory injunction) two other judges.' * * * We find no expression of or implication anywhere in the section justifying the assumption that there was an intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the appli-

cation, in the event that he was of opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction.

Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction."

Mandamus is the proper remedy since no appeal lies from Judge Bourquin's order and Judge Pray's inaction can only be corrected by mandamus. In *Ex parte Metropolitan Wat Co., supra*, a three judge case, District Judge McPherson first issued a temporary restraining order, and later without convening a three judge court, vacated the restraining order and denied a temporary injunction. Mandamus was held to be the proper remedy to correct this error, the court saying:

"It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute" (pp. 545-546).

In *Cumberland Tel. Co. v. Pub. Serv. Comm.*, 260 U. S. 212, 216, this Court again considered this law and said:

> "This Court had occasion to consider the purport and significance of § 17 of the Act of June 18, 1910, embodied in § 266, in *Ex parte Metropolitan Water Co.*, 220 U. S. 539, and there held that, after a District Judge had granted a preliminary restraining order in such a case as provided, the same judge could not set aside his own order; and such act by him was without jurisdiction."

Since Judge Pray had no jurisdiction to set aside his temporary restraining order or to do anything thereafter other than to convene a court of three judges, *a fortiori* Judge Bourquin had no power to dissolve the temporary restraining order or to dismiss the bill. While the State of Montana constitutes one judicial district and either district judge may sit in any case brought anywhere in the district (Sec. 172, Title 28, United States Code), it is unnecessary to say that neither judge has power to supervise or reverse orders made by the other. In *Hardy v. North Butte Mining Co.*, 22 Fed. (2d) 62, the Circuit Court of Appeals for the Ninth Circuit, in passing upon a case in which District Judge Bourquin had set aside an order of another district judge sitting in the same district, condemned the practice in very plain language.

As stated in the motion for leave to amend, petitioners ask that Judge Pray be made a party respondent. We do this because of the continued failure of Judge Pray to take action in the case. As a practical matter, however, our original petition is sufficient, since it is directed to the District Court of the State of Montana. In *Hollon Parker, Petitioner*, 131 U. S. 221, the question whether mandamus might issue to a court was considered and it was there said:

> "The mandamus is to correct a mistake as to its jurisdiction, committed by the court, and although it is the

custom in such cases to direct the writ not merely to the court but to its judges by name, yet including their names within the writ, except in special cases where disobedience may be apprehended, is at the present day little more than a mere matter of form. Disobedience to the writ would be as unusual on the part of the court to which it is directed as would be a refusal to carry into effect the reversal of its judgment in an ordinary action. The object of the writ in the present case is to require the court to proceed in a matter properly cognizable by it, but upon which, from a mistaken view of the law as to its jurisdiction, it has refused to act. *Thompson v. United States,* 103 U. S. 480, 483; *People v. Collins,* 19 Wend. 56; *State v. Warner,* 55 Wisconsin, 571" (p. 226).

This practice was also followed in *Ex parte Metropolitan Water Co., supra.*

If it be suggested that petitioners should have moved more quickly in requesting this Court to issue a writ of mandamus, the answer is that rightly or wrongly the practice in states in which there are few district judges of the United States is to await the convenience of the judges in convening a three-judge court. The statute is clear and by its terms a district judge is required to call "immediately" two other judges to assist him to hear and determine the application. The delay in such cases, we submit, is not the fault of litigants but the fault of the district judges. As soon as it developed that Judge Pray would not call in two judges because of Judge Bourquin's action, petitioners did move.

This brief might well stop at this point, for there is nothing further that petitioners can say in support of their motion for leave to file. However, District Judge Bourquin in two opinions (Motion for Leave to File, p. 56, and Motion for Leave to Amend, p. 22) has insisted that the bill of complaint fails to

state a cause of action. While a complete answer to that contention is, first, that Judge Bourquin had no jurisdiction in the case and his opinions are therefore immaterial, and second, Judge Pray, who has jurisdiction, evidently found the bill of complaint sufficient, if the question was before him, inasmuch as he issued a temporary restraining order and accepted an application to convene a court of three judges, nevertheless proper respect for the District Court of Montana probably requires that some comment be made on Judge Bourquin's opinions. Judge Bourquin says in his opinion of August 6 (Motion for Leave to Amend, p. 22):

> "The motions heard, the complaint was dismissed; for whereas it alleged that the intrastate rates would disturb an established rate structure, are discriminatory and will deprive plaintiffs of revenue, neither in facts nor in conclusions did it appear that the discrimination is of that evil kind which alone is forbidden, viz., undue, unreasonable or unjust."

To this criticism two answers may be made. In the first place the bill does set forth in the plainest language the way in which interstate rates and intrastate rates on petroleum and petroleum products in Wyoming, Montana, Idaho and Washington are interrelated and interdependent. It is alleged that any change in the Montana scale would upset a rate structure that covers a number of states and that the establishment of an unreasonably low scale would directly burden and discriminate against interstate commerce and localities in adjoining states (Motion for Leave to File, pp. 17 and 18). Facts are set out to sustain a claim that the interstate rates have been found reasonable by the Interstate Commerce Commission and it is alleged that since the publication of the Montana Board's order interstate shippers have demanded that these reasonable interstate rates be lowered so that interstate shippers may be placed

upon the same competitive basis as Montana shippers (Motion for Leave to File, pp. 19 and 20). It is alleged that the order is violative of paragraph (4) of Section 13 of the Interstate Commerce Act, which paragraph expressly forbids unlawful discrimination against interstate commerce and persons and localities in interstate commerce. By no possibility could any one read this bill of complaint without understanding that the discrimination complained of is that prohibited by paragraph (4) of Section 13. In the second place Judge Bourquin fails to appreciate the purpose of the suit. Nothing is better settled than that courts may not pass upon questions of discrimination; they are for proper administrative bodies to decide. Petitioners did not ask the District Court for an injunction based upon a finding that discrimination against interstate commerce existed. They set forth facts and circumstances on which they were contending in a proceeding before the Interstate Commerce Commission that the order of the Montana Commission does discriminate unlawfully against interstate commerce. But the relief asked from the court was merely the exercise of its equity powers to enjoin the enforcement of the order until the Interstate Commerce Commission could pass upon the question. Furthermore, the form of the bill complies with Equity Rule 25, which requires that mere statements of evidence be omitted. When a court of three judges is called, petitioners will be in a position to exhibit to that court their Section 13 petition (Motion for Leave to File, p. 26) in which there are detailed allegations of the way in which the order of the Montana Commission discriminates unlawfully against interstate commerce. If the bill of complaint is insufficient the court of three judges will say so. It is the only court which now has power to pass upon that question.

We submit the rule must be that when a bill of complaint and an application to convene a three-judge court are presented

to a district judge, he may consider the bill only to determine whether or not it presents a Section 380 case. Beyond that he cannot go. It is for a court of three judges to say whether or not the bill states a *good* cause of action. If we are wrong about this and the district judge has authority to determine whether the bill states a cause of action, Judge Pray must have found that petitioners' bill was sufficient, since he issued a temporary restraining order.

Another matter referred to in Judge Bourquin's opinion of August 6 must be briefly referred to in order that this Court may have all the facts. Judge Bourquin says (Motion for Leave to Amend, p. 23): "The court is advised that since said order, the interstate commerce commission has denied plaintiffs' application, and that plaintiffs have applied for mandamus against the commission." The court makes that statement the introduction to a criticism of public service corporations rather than a justification for his order. The facts in regard to the proceeding before the Commission are not alleged in petitioners' motion to amend, inasmuch as they are not believed by petitioners to be of any importance in the determination of their right to a writ of mandamus. The facts, however, are these: As stated in petitioners' bill of complaint, they filed their Section 13 petition with the Interstate Commerce Commission on the 15th day of April, 1929. The Commission advised petitioners by letter on June 14 that the Commission had decided in conference on June 10 that the Section 13 petition filed by petitioners was premature. The ground for this decision was that the issuance of the temporary restraining order, secured by petitioners in the District Court of the United States, prevented the rates prescribed by the Montana Commission from going into effect and that the Interstate Commerce Commis-

sion had consequently no jurisdiction to consider the petition or to enter upon the investigation prayed for in the petition. Petitioners then requested the Interstate Commerce Commission to reconsider its conclusion and the Commission did consider the matter again, but on July 8, 1929, again voted in conference to deny the petition. Petitioners were advised of this action by letter from the Chief Examiner of the Commission dated July 15, 1929. On July 23 petitioners filed in the Supreme Court of the District of Columbia a petition for a writ of mandamus directing the Interstate Commerce Commission to exercise the jurisdiction conferred upon it by the Interstate Commerce Act and to enter upon an investigation and to hold a full hearing, all as required by Section 13 of the Act. A rule was issued requiring the Commission to show cause why a writ of mandamus should not issue. The Commission has filed its answer and the case is set down for hearing on the 24th day of September, 1929. As the merits of that litigation are not before this Court petitioners may not with propriety state their grounds for believing the Interstate Commerce Commission acted mistakenly in deciding that a temporary restraining order, issued by a United States Court for the sole purpose of suspending an order of the Montana Commission until the Interstate Commerce Commission might determine whether or not the order unlawfully burdened interstate commerce, automatically deprived the Commission of jurisdiction to proceed under Section 13. Petitioners' case in the Supreme Court of the District is based on the belief that Congress never intended that in all cases carriers must submit to an order of a State Commission establishing an unlawful basis of rates during the period that intervenes between the filing of a Section 13 application and final determination of it by the Commission. In some cases it must be proper to restrain enforcement of the order until its lawfulness is determined. In the instant case

petitioners would lose more than $400,000 by such a course if it were eventually found by the Interstate Commerce Commission that the order of the Montana Commission was unlawful. Doubtless the Interstate Commerce Commission would have held its jurisdiction destroyed if the restraining order had been secured in a state court. However that may be, the courts of Montana may not suspend a rate order pending review. *State v. District Court,* 53 Mont. 229, 163 Pac. 115.

But neither the sufficiency of the bill of complaint nor the lawfulness of the action of the Interstate Commerce Commission is before this Court. The only question here is whether the bill of complaint states a case under Section 380, Title 28, United States Code, and whether application was made for a court of three judges. We have already shown that this is a Section 380 case and that proper application for an interlocutory injunction was made. Motion for leave to file is denied by this Court when the relief sought by the petition cannot be granted. *Ex parte Buder,* 271 U. S. 461, 464. The relief sought here can be granted. *Ex parte Metropolitan Water Co., supra.* As recently as May 20 of this year a district judge of the United States, Judge William B. Sheppard of the District Court for the Northern District of Florida, was directed by this Court to call together a three-judge court in accordance with the statute. The motion for leave to file should be granted, and a rule to show cause entered and issued against the respondents.

Respectfully submitted,

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

Original ..... No. 21.

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION FOR LEAVE TO AMEND AND SUPPLEMENT PETITION FOR WRIT OF MANDAMUS.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION FOR LEAVE TO AMEND AND SUPPLEMENT PETITION FOR WRIT OF MANDAMUS.

Now come the above named petitioners and move for leave to amend their petition for a writ of mandamus by including the Honorable Charles N. Pray, District Judge of the United States for the District of Montana, as a party respondent, and move that a rule to show cause be entered and issued against said Honorable Charles N. Pray, and further move for leave to supplement their petition by adding the following averments made necessary by developments in this litigation since petitioners' motion for leave to file their petition for a writ of mandamus was lodged with the Clerk of this Court:

I.

On June 10, 1929, petitioners, appearing specially and without waiving their claim that the Honorable George M. Bourquin had no jurisdiction to make the decision and order of May 31, 1929, dismissing petitioners' bill of complaint in the suit pending in the United States District Court for the District of Montana, advised District Judge Bourquin that they had lodged with the Clerk of the Supreme Court of the United States a motion for leave to file a petition for a writ of mandamus against him and the District Court of Montana, and requested District Judge Bourquin to stay the operation and effect of the order and decree entered by him on May 31, 1929, until said mandamus proceedings in the Supreme Court of the United States were completed. The request for a stay was denied forthwith.

II.

On June 13, 1929, during the summer recess of this Court, petitioners presented to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, a motion for an order to preserve the *status quo* in said suit in the District Court of the United States for the District of Montana until the motion now on file with this Court for leave to file their petition for a writ of mandamus be passed upon and the right to said writ determined. This motion and the affidavit made in support thereof are on file with the Clerk of this Court. A copy of said motion and affidavit are hereto attached marked Exhibit A. After full consideration of said motion an order was made by Mr. Justice Van Devanter on the 13th day of June, 1929, reinstating the temporary restraining order granted by the Honorable Charles N. Pray, District Judge of the United

States for the District of Montana on April 15, 1929, and continuing said order in full force until the first motion day of the October term, 1929, of the Supreme Court of the United States, and until the petition for mandamus is disposed of by this Court. A copy of said order marked Exhibit B is hereto attached and made a part hereof.

III.

The order of June 13, 1929, provided that it should take effect only upon the filing in the office of the Clerk of the Supreme Court of the United States of a good and sufficient bond in the sum and containing the terms set forth in said order. Such a bond duly approved by the Clerk of this Court was filed with the Clerk on June 14, 1929.

IV.

Said order further provided that it should be without prejudice to the power and authority of the District Court of the United States for the District of Montana when three judges were sitting conformably to Section 380 of Title 28 of the United States Code, to vacate the challenged decree of May 31, 1929, and to hear and determine the application for an interlocutory injunction, and to continue, modify or revoke the said temporary restraining order of April 15, 1929, as to that court when so constituted might appear meet and proper.

V.

As provided in said order a certified copy thereof was transmitted by the Clerk of this Court to the District Court of the United States for the District of Montana sitting at Butte, Montana, to the Attorney General of the State of Montana,

and to Francis A. Silver of Helena, Montana, who appeared in the District Court of the United States for the District of Montana as representing the defendants in the suit. Said Francis A. Silver on receipt of said certified copy dismissed a suit entitled, "The State of Montana, Plaintiff, v. Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Chicago, Burlington & Quincy Railroad Company, Butte, Anaconda & Pacific Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Montana, Wyoming & Southern Railroad Company, White Sulphur Springs & Yellowstone Park Railway Company, Oregon Short Line Railroad Company, Defendants", brought by him in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark on the 12th day of June, 1929, in which suit a temporary restraining order had been issued upon the filing of the complaint, requiring petitioners to comply with the terms of Report and Order No. 1533 of the Board of Railroad Commissioners of the State of Montana issued in its Docket No. 1020, the enforcement of which Report and Order had been temporarily restrained by District Judge Pray in the District Court of the United States by order dated April 15, 1929. Counsel for petitioners, who presented to Mr. Justice Van Devanter on June 13th the motion to preserve the *status quo*, first learned of the pendency of the above described case in State Court on June 14th.

VI.

A certified copy of the order made by Mr. Justice Van Devanter on June 13, 1929, was received by the District Court of the United States for the District of Montana on June 19, 1929. Petitioners waited until July 2, 1929, for a court of

three judges to be convened, as required by Section 380 of Title 28 of the United States Code, and on July 2nd filed with the Clerk of said District Court a petition addressed to the Honorable George M. Bourquin, and Honorable Charles N. Pray, District Judges of the United States for the District of Montana, and to the District Court of the United States for the District of Montana, calling attention to the order of June 13, 1929, and the provision in the order with reference to further proceedings conformably to Section 380 of Title 28 of the United States Code and urged immediate compliance with said Section 380 by convening a court of three judges to hear petitioners' application for an interlocutory injunction. Copies of the petition were handed by counsel for petitioners to District Judge Bourquin and to District Judge Pray. A copy of the petition marked Exhibit C is hereto attached and made a part hereof. On August 6, 1929, Judge Bourquin filed a written decision and opinion, a copy of which marked Exhibit D is hereto attached and made a part hereof.

District Judge Pray has failed to take any action in this matter. In their petition for a writ of mandamus petitioners allege:

> "That it was the duty of Judge Pray to call immediately two judges to his assistance to hear petitioners' motion for an interlocutory injunction, and at the time Judge Bourquin dismissed the bill of complaint petitioners were waiting for Judge Pray to fix the date of hearing before three judges and to call in said judges and give petitioners the hearing to which they are entitled under Section 266 of the Judicial Code as construed and enforced by this court. That Judge Pray at no time refused to call two other judges to his assistance and it is the understanding and belief of petitioners that he would have done so were it not for the unlawful action of Judge Bourquin in dismissing petitioners' bill of complaint" (Petition, p. 11).

For this reason petitioners did not specifically name District Judge Pray as a respondent, though he was in effect a respondent as petitioners did make the District Court of the United States for the District of Montana a party respondent following the procedure in *Ex Parte Metropolitan Water Company*, 220 U. S. 539. Because of the continued failure of District Judge Pray to call two judges to his assistance to hear petitioners' application for an interlocutory injunction petitioners now ask that he be formally made a party respondent to this proceeding.

Wherefore petitioners pray that a rule be entered and issued directing the Honorable George M. Bourquin, District Judge, and the Honorable Charles N. Pray, District Judge, and the District Court for the District of Montana, to show cause why a writ of mandamus should not issue against them to annul and set aside the order and decree of May 31, 1929, dismissing the petitioners' bill of complaint, and further directing said Honorable Charles N. Pray, District Judge, and the District Court for the District of Montana to call two other judges conformably to Section 380 of Title 28 of the United States Code to assist the Honorable Charles N. Pray, District Judge, to hear and determine petitioners' application for an interlocutory injunction.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

STATE OF MINNESOTA,
County of Ramsey.—ss.

B. W. Scandrett being duly sworn deposes and says he is Vice President of the Northern Pacific Railway Company, one of the petitioners herein; that he has read the foregoing motion for leave to amend and supplement the petition for writ of mandamus and knows the contents thereof; that the allegations of the same are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

B. W. SCANDRETT.

Subscribed and sworn to before
me this 10th day of September, 1929.
G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.
My commission expires Oct. 21, 1935.
(Notarial Seal)

EXHIBIT A.

IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION.

Now come the petitioners in the above entitled matter and move the court and the single justice to whom this motion is presented that a Writ of Supersedeas be issued to stay the operation and effect of the order of Honorable George M. Bourquin, District Judge of the United States for the District of Montana, made and filed on the 31st day of May, 1929, dismissing the bill of complaint of the petitioners against the Board of Railroad Commissioners of the State of Montana, and Lee Dennis, Daniel Boyle and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners, and

L. A. Foot, as Attorney General of the State of Montana, then pending in the District Court of the United States for the District of Montana. In the alternative petitioners pray for such other or additional Writ or order as may be just and proper in order to preserve the *status quo* in said suit in the District Court of the United States for the District of Montana until the motion now on file with this Honorable Court for leave to file a petition for a Writ of Mandamus against the Honorable George M. Bourquin, District Judge of the United States for the District of Montana and against the District Court of the United States for the District of Montana be passed upon by this Honorable Court and the right to said Writ of Mandamus be determined. This motion is based upon the verified petition for Writ of Mandamus attached to the motion for leave to file said petition and the affidavit hereto attached of Dennis F. Lyons, one of the attorneys for petitioners.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

STATE OF MINNESOTA,
County of Ramsey.—ss.

DENNIS F. LYONS, being first duly sworn, doth depose and say that he is a resident of St. Paul, Minnesota, and General Counsel of the Northern Pacific Railway Company, one of the above named petitioners. That he is one of the attorneys for petitioners in the above entitled matter and that he is familiar with all the matters set forth in the petition for a Writ of Mandamus attached to petitioners' motion for leave to file, and knows that the allegations of said petition are true.

That on Wednesday, June 5, 1929, affiant was in Helena, Montana, assisting and advising Mr. M. S. Gunn, one of the

attorneys for petitioners, in the preparation of necessary papers for an application to this court for a Writ of Mandamus against the Honorable George M. Bourquin, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

That while so engaged, Mr. Francis A. Silver, attorney for the Board of Railroad Commissioners of Montana, called Mr. Gunn on the telephone and inquired what action the railroads contemplated in view of Judge Bourquin's order of May 31st dismissing their bill of complaint. That Mr. Silver was then fully advised of the position of the petitioners that Judge Bourquin's order was wholly void and was told that a petition for a Writ of Mandamus was being drafted and would be filed as soon as possible.

That on Thursday, June 6, 1929, said Board of Railroad Commissioners wired the Traffic Department of each of your petitioners as follows:

> "The Board has not received your tariffs on petroleum and petroleum products ordered effective April 17th in re order 1533 Docket 1020. You are aware that Judge Bourquin on May 31st dismissed suit in which these rates were temporarily enjoined. Advise by wire when tariffs will be filed."

That affiant on Friday, June 7, 1929, wired said Board of Railroad Commissioners as follows:

> "Our traffic department has referred to me your telegram about tariffs on petroleum and petroleum products stop I have just arrived from Helena where I spent Wednesday with local counsel preparing papers for filing in United States Supreme Court to determine right of Judge Bourquin to dismiss our bill stop It is our contention that the restraining order is still in full force and effect and that the order of Judge Bourquin is wholly void stop

Our plan of procedure and our theory of the law were outlined to your Counsel Mr. Silver on Wednesday stop Papers will be filed in Supreme Court Monday stop We desire to get a speedy and orderly decision of this matter believing this to be in the best interest of all parties to the case stop Copies of papers will be sent to your counsel and we shall be glad to have his cooperation which will be very effective to secure an early hearing on our petition for mandamus."

That affiant understands that the other petitioners all advised said Board of Railroad Commissioners that mandamus proceedings were being instituted in this court and that for that reason they did not intend to file new tariffs.

That affiant is informed and believes that later in the day of June 7, 1929, the Board of Railroad Commissioners of Montana wired the Sunburst Oil Company, a shipper of petroleum and petroleum products as follows:

"Rates prescribed in our order fifteen thirty three are now in effect in our opinion any carrier demanding or receiving a greater charge is guilty of extortion in violation section thirty eight naught four revised codes."

That as set forth in the petition for a Writ of Mandamus Section 3804 provides penalties of not less than five hundred dollars nor more than two thousand dollars for each offense. That said Board of Railroad Commissioners threaten and will bring numerous actions against petitioners to recover penalties under Section 3804 and other sections of the Montana Revised Code, and will advise and encourage shippers generally throughout the State of Montana to refuse to pay existing tariff rates on petroleum and petroleum products and to tender only rates prescribed in the Commission's order No. 1533.

That on Monday, June 10th, after petitioners had filed with this Court their Motion for Leave to File a Petition for a Writ of Mandamus, petitioners applied to said Honorable George M. Bourquin, District Judge, to stay his order of May 31, 1929 dismissing plaintiffs' Bill of Complaint, and to stay the operation and effect thereof, until said mandamus proceedings which he was advised had been instituted in this Court had been determined. That said District Judge Bourquin refused to grant a stay and upon being requested to note his refusal on the form of stay order presented to him, noted on said order, "Case dismissed there is nothing to stay. Denied. Bourquin, J."

DENNIS F. LYONS.

Subscribed and sworn to before
me this 11th day of June, 1929.

G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.
My commission expires Oct. 21, 1935.
(Notarial Seal)

EXHIBIT B.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

It appearing that the above named petitioners have lodged with the Clerk of the Supreme Court of the United States their petition for a Writ of Mandamus against George M. Bourquin, District Judge of the United States for the District of Montana and against the District Court of the United States for the District of Montana,

And it appearing that such petitioners have lodged with the said clerk a motion for an order preserving the status quo as existing at the time of the rendition of the decree hereinafter mentioned,

And it appearing from an inspection of the said petition and motion and the affidavits presented therewith that the petitioners commenced a suit in equity in the District Court of

the United States for the District of Montana on the 15th day of April, 1929 against the Board of Railroad Commissioners of the State of Montana and Lee Dennis, Daniel Boyle, and Leonard C. Young as members of said Board and L. A. Foot as Attorney General of said state; that the said suit was essentially one to have an order of the said Commission prescribing rates, fares and charges to be collected for the intrastate transportation of petroleum and petroleum products declared void because in conflict with the Constitution and laws of the United States and to enjoin and prevent the enforcement by the said defendants of said order because its enforcement in the manner prescribed by the laws of Montana would be in contravention of the Constitution and laws of the United States; that the said suit is essentially within the terms and provisions of Section 380 of Title 28 of the United States Code; that in such suit the petitioners not only sought a permanent injunction against the enforcement of said order but also sought an interlocutory injunction against such enforcement pending the determination of the suit; that the petitioners requested the presiding judge of said District Court to convene three judges to hear the application for an interlocutory injunction conformably with Section 380 Title 28 of the United States Code and further moved the presiding judge to grant a temporary restraining order pending the convening of three judges and the hearing and determination of the application for an interlocutory injunction; and that the said presiding judge (District Judge Pray) did on April 15, 1929 grant a temporary restraining order against the enforcement of the rate order of the said commission pending the calling in of two other judges and the hearing and determination of the application for an interlocutory injunction,

And it further appearing that thereafter George M. Bourquin, a district judge of the United States for the District of Montana sitting alone in said District Court, without the assistance of two other judges did hear and entertain over the objection and protest of the petitioners a motion by the defendants in said suit to dismiss the said suit for want of equity and a motion by the said defendants to dissolve the temporary restraining order theretofore granted; that on consideration of such motions the said George M. Bourquin, District Judge, sitting alone in said court did on May 31, 1929 make and enter a decree in said suit dismissing the same for want of equity; and that such decree of dismissal, if valid, operated not only to dismiss the said suit but also to dissolve the temporary restraining order theretofore granted therein,

And it appearing that by the petition for Mandamus before described the petitioners assert that George M. Bourqin, District Judge, was without authority when sitting alone, to entertain, hear or determine either the said motion to dismiss the suit or the said motion to dissolve the said temporary restraining order; that the action of George M. Bourquin, District Judge, in that regard was in contravention of Section 380 of Title 28 of the United States Code and therefore was entirely void; and that the petitioners are seeking from the Supreme Court of the United States a Writ of Mandamus directing George M. Bourquin, District Judge, and the District Court for the District of Montana to set aside the said decree of Dismissal of May 31, 1929 and to take such other and further proceedings in said suit as may be in accord with Section 380 of Title 28 of the United States Code;

And it further appearing that the defendants in the said suit in equity are about to proceed to enforce the said rate order of the State Commission and are relying on the said decree of

dismissal as effectively terminating the said suit and fully dissolving the said temporary restraining order theretofore granted therein,

And it further appearing that the action of George M. Bourquin, District Judge, in hearing and determining the said motion to dismiss the suit and the said motion to dissolve the said temporary restraining order, all when sitting alone and without the assistance of two other judges, was probably in contravention of Section 380 of Title 28 of the United States Code and of the decisions of the Supreme Court of the United States in Ex Parte Metropolitan Water Company 220 U. S. 539 and in Cumberland T. & T. Co. vs. Louisiana Public Service Commission 260 U. S. 212, and in Atlantic Coast Line Company vs. Sheppard (decided May 20, 1929),

And it further appearing that the enforcement of the said rate order of the State Commission, pending the presentation, hearing and determination of the petition for Mandamus before described, will subject the petitioners to irreparable damage and loss.

It is now ordered that the said temporary restraining order granted April 15, 1929 be reinstated and continued in full force until the first motion day of the October Term, 1929, of the Supreme Court of the United States and until said petition for Mandamus is disposed of by said Court.

This order shall be subject to two conditions as follows:

First, this order shall be without prejudice to the power and authority of the District Court of the United States for the District of Montana, when three judges are sitting conformably to Section 380 of Title 28 of the United States Code, to vacate the challenged decree of May 31, 1929 and to hear and determine the application for an interlocutory injunction and to continue, modify or revoke the said temporary restraining

order of April 15, 1929, as to that court, when so constituted, may appear meet and proper.

Second, this order shall take effect only upon the filing in the office of the Clerk of the Supreme Court of the United States of a good and sufficient bond in the sum of $300,000.00 with adequate surety, approved by such Clerk, conditioned that the petitioners shall jointly and severally pay and make good all damages and loss which may be sustained by the defendants in the said suit in equity or any of them or by any shipper in the event it shall prove that the said temporary restraining order ought not to have been granted or ought not to have been reinstated or continued in force, as is done by this order. But the terms damages and loss as used therein shall not be taken as including penalties. The said bond shall run to the United States of America for the benefit of whomsoever may be interested in its enforcement; and the petitioners by causing said bond to be given and accepting the benefits of this order shall be deemed to have assented that, in the event aforesaid, the said damages and loss may be ascertained and determined by appropriate proceedings in the said suit in equity and the bond be enforced therein for the benefit of whomsoever may suffer damage or loss through the granting or continuing of the said temporary restraining order. Upon the filing of such bond so approved the Clerk of the Supreme Court of the United States shall transmit a certified copy of this order to the District Court of the United States for the District of Montana, sitting at Butte, Montana, to the Attorney General of the Sate of Montana, and to Francis A. Silver of Helena, Montana, who appeared in the District Court of Montana as representing the defendants in the suit.

Dated June 13, 1929.

(Signed) WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court
of the United States.

EXHIBIT C.

IN THE DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MONTANA.
HELENA DIVISION.

IN EQUITY.

No. .....

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, and LEE DENNIS, DANIEL BOYLE and LEONARD YOUNG, as members of and constituting said Board of Railroad Commissioners, and L. A. FOOT, as Attorney General of the State of Montana,

Defendants.

To the Honorable George M. Bourquin, and Honorable Charles N. Pray, District Judges of the United States for the District of Montana, and to the District Court of the United States for the District of Montana.

Now come the plaintiffs herein and for their petition respectfully state:

On the 13th day of June, 1929, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, made an order in that certain matter pending in the Supreme Court of the United States, entitled: "In the Matter of the petition of Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and Chicago, Burlington & Quincy Railroad Company, for a Writ of Mandamus against the Honorable George M. Bourquin, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana", reinstating the temporary restraining order granted in this suit on April 15, 1929, and continuing it in full force and effect until the first motion day of the October term, 1929, of the Supreme Court of the United States, and until said petition for mandamus is disposed of by said court and in said order provided that the order should be without prejudice to the power and authority of the District Court of the United States for the District of Montana when three judges are sitting conformably to Section 380 of Title 28 of the United States Code to vacate the challenged decree of dismissal of plaintiffs' bill of complaint, dated May 31, 1929, and to hear and determine the application for an interlocutory injunction and to continue, modify or revoke the said temporary restraining order of April 15, 1929, as to that court, when so constituted, may appear meet and proper. That bond in the sum of $300,000.00, required by said order, was furnished by petitioners, approved by the Clerk of the Supreme Court of the United States, and filed with said Clerk, as is evidenced by the filing of a copy of said order, certified to be a true and correct copy, by the Clerk of the Supreme Court of the United States in the office of the Clerk of this Court.

That no court of three judges having been convened pursuant to the application of the plaintiffs herein, under Section 380 of Title 28 of the United States Code, plaintiffs respectfully urge immediate compliance with said Section 380 of the United States Code by convening a court of three judges to hear plaintiffs' application for an interlocutory injunction.

Dated this ..... day of June, A. D. 1929.

Respectfully submitted,

NORTHERN PACIFIC RAILWAY COMPANY,
By F. J. GEHAN
M. S. GUNN CARL RASCH E. M. HALL
Solicitors.

GREAT NORTHERN RAILWAY COMPANY,
By R. J. HAGMAN
W. L. CLIFT
T. B. WEIR
Solicitors.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
By HOWARD TOOLE
W. L. MURPHY A. N. WHITLOCK
Solicitors.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By M. S. GUNN CARL RASCH E. M. HALL
Solicitors.

EXHIBIT D.

UNITED STATES DISTRICT COURT, MONTANA.

#692.

Nor. Pac. Ry. Co. et al

vs.

Board Etc. Coms., et al.

April 15, 1929, the plaintiffs, four railroads, commenced this suit to enjoin the defendants from enforcing an intrastate rate order until plaintiffs' application for a section 13 hearing made to the interstate commerce commission had been determined. The usual temporary restraining order issued. Far from the seats of the mighty, the local practice is to consult the convenience of supreme court justices or circuit judges, before any of them is called to sit in a three-judge court, and the necessity is understood and acquiesced in by the parties.

Before any three-judge court could be convened, defendants moved to dismiss the suit and to dissolve said restraining order, on the ground, among others, that the complaint was insufficient in facts to state a cause of action. The motions heard, the complaint was dismissed; for whereas it alleged that the intrastate rates would disturb an established rate structure, are discriminatory and will deprive plaintiffs of revenue, neither in facts nor in conclusions did it appear that the discrimination is of that evil kind which alone is forbidden, viz., undue, unreasonable or unjust.

Obviously, however valid a new intrastate rate, it will disturb the established rate structure and may discriminate and deprive railroads of revenue. And that discrimination, the discrimination charged, differs from that forbidden, as day from night or lawful from unlawful.

Thereafter and June 19, 1929, in the clerk's office was received from the clerk of the supreme court an order by Mr. Justice Van Devanter wherein is stated that plaintiffs had applied to the supreme court for mandamus against this court; that the dismissal aforesaid by a court of one judge and consequent dissolution of the restraining order was "probably in contravention of Sec. 380, title 28, USC, and of the Metropolitan Co. Case, 220 U. S. 539, Cumberland Co. Case, 260 U. S. 212, and Atlantic Coast Line Co. Case, — —U. S. ——, May 2, 1929"; that "it is now ordered that the temporary restraining order be reinstated and continued" until disposition of the application for mandamus; and that the order was "without prejudice to the authority" of this court "when three judges are sitting conformably to Sec. 380, to vacate the dismissal and hear the application for injunction."

The court is advised that since said order, the interstate commerce commission has denied plaintiffs' application, and that plaintiffs have applied for mandamus against the commission. In the meantime the ultimate consumer, unprotected by the bond to the shipper and without right to reimbursement, as usual "pays the freight." But the railroads are safe. As a rule public utilities profit by long drawn out resistence to reduction of rates, less, however, in cases like this at bar than in some others. For during the litigation, sheltered by the aegis of the court, they collect the old rates from multitudes of small patrons many of who do not apply for reimbursement

aggregating large sums when the utilities' resistence finally fails.

Adverting to the order of Mr. Justice Van Devanter, its phraseology leaves it doubtful if it imports a command to this court to reinstate the restraining order, which it has not done, or such order granted by himself.

Its language is appropriate to the former but not to the latter. However, as a justice of the supreme court has no authority to so order a district court in the instant if in any circumstances, it is assumed the learned justice himself granted the restraining order; and the ambiguous phrasing is probably due to some counsel who prepared and presented it for signature more or less complacently given without particular scrutiny.

Although precedent may be found for anything (U. S. v. Ry. Co., 1 Fed. (2) 57) none has been found for authority in a supreme court justice to issue an order to a district court to reinstate a restraining order in present if in any circumstances. Moreover it is believed the speculation that in its dismissal of the suit this court contravened Sec. 380 and cases cited, and the suggestion that this court has authority to now convene a three-judge court to vacate the dismissal are also untenable and likewise due to counsel. Sec. 380 was enacted to remedy a well known evil, viz., that activities of sovereign states too frequently enjoined by a single judge too prone to sign on the dotted line upon the request of public utilities. Accordingly it provides no interlocutory or permanent injunction shall be granted until the application has been heard by a three-judge court, one of whom shall be a supreme court justice or a circuit judge; and that application made to any judge "he shall immediately call" others as aforesaid to hear and determine it. This cumbersome method is not in terms nor in reason extended to include aught

else in the suit, as pleas to jurisdiction, motions to dismiss for insufficiency of the complaint, or other motions incidental to progress of the suit. These latter are not of the evils to be remedied or object to be attained and come within the rule of expressio unius, etc. It would be anomalous indeed, if however insufficient in facts is the complaint, the judge must ignore the fatal defect and at once call hither, say, Chief Justice Taft and Judge Hand (for they could be and the statute implies a duty to come) to hear the application for an injunction. Sheer futility as well as absurdity, for the three-judge court could only deny the application and adjourn. The statute will not reasonably bear any such absurd construction. It is clearly the duty of the court, a single judge sitting, to determine whether the complaint states a cause of action, will support an injunction, before he calls distant and busy judges to grant one. And in this is no contravention of the cases cited.

As the suit is dismissed, there is nothing upon which this court can predicate a call to other judges, as in said order suggested.

Sec. 380 contemplates a call in a suit pending, only. And if in present circumstances called, the result would likely be as futile as Glendower's of spirits from the vasty deep.

Wherein would be the authority to come, their jurisdiction to review and vacate this court's dismissal of the suit? Not in Sec. 380, for therein none such appears; not in this court's call, for it has no jurisdiction to issue it save in a pending suit.

This suit is not pending. Presently it is as dead as Julius Caesar.

Plaintiffs' motion to convene a three-judge court as suggested aforesaid is denied.

Aug. 6, 1929. BOURQUIN, J.

FILE COPY

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F I
DEC
CHARLES E

Supreme Court of the United States

No. 21, Original—October Term, 1929.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

Dated December 20, 1929.

Supreme Court of the United States

No. 21, Original—October Term, 1929.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

Now come the petitioners, Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company, and move the court to issue a formal writ of mandamus in the above entitled matter against the respondents, requiring them to do and perform the acts specified in the rule to show cause made in this proceeding on October 14, 1929.

The grounds relied upon for this motion are these:

The rule to show cause issued on October 14, 1929, reads as follows:

> "PURSUANT TO AN ORDER of this Court entered October 14, 1929, you, THE HONORABLE GEORGE M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, and the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, are hereby ordered

to show cause, if any cause there be, in printed form, returnable on the first motion day following a period of thirty days from this date, why a writ of mandamus should not issue out of this Court requiring you to annul and set aside the order and decree of May 31, 1929, dismissing the petitioners' bill of complaint in the above entitled cause. And further that you, THE HONORABLE CHARLES N. PRAY, Judge of the District Court of the United States for the District of Montana, and the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, are hereby ordered to show cause, if any cause there be, in printed form, returnable on the first motion day following a period of thirty days from this date, why a writ of mandamus should not issue out of this Court requiring you to call to your assistance two other Federal Judges as provided by section 266 of the Judicial Code, as amended, (Title 28, section 380 of the United States Code) to hear and determine the petitioners' application for an interlocutory injunction in the above entitled cause.

A true Copy
Test:
CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court
of the United States.

(Seal of the Supreme Court)
(of the United States)

October 14, 1929."

On December 2, 1929, this court made absolute the rule to show cause, saying:

"It follows that the rule against the respondents must be made absolute with directions to them to vacate the decree of dismissal entered by Judge Bourquin and to take immediate steps for assembling a court of three judges to hear and determine the application for an interlocutory injunction conformably to section 380. We assume it will not be necessary to issue a formal writ."

On December 14, 1929, Judge Bourquin made and filed the following order in the case pending in the District Court:

> "No. 692, N. P. Ry. Co., et al v. Board of Railroad Commissioners, et al.
>
> "Herein, it is ordered by the Court that the hearing both in respect to the application for a temporary and final injunction, be set for January 25, 1930, at 9:30 A. M. at Helena, Montana, and that a statutory court be constituted for said day consisting of Circuit Judge Deitrich and District Judges Bourquin and Pray.
>
> "Court further ordered that W. D. Tipton, Esq., of Helena, Montana, is appointed Special Master to take the testimony in this cause and file the same in this Court on or before said January 25, 1930."

This order was not made upon the application or motion of any party to the proceeding in the District Court. No other order has been made in the case by Judge Bourquin since December 2, 1929, and no other order of any sort has been made by Judge Pray, or by the District Court for the District of Montana. A certified copy of said order has been filed with the clerk of this court.

WHEREFORE petitioners pray that a formal writ of mandamus issue, directing each of the respondents to perform the acts set forth in said rule to show cause of October 14, 1929, and directing Judge Bourquin to annul and set aside his order of December 14, 1929, or in the event that this court shall consider the order made by Judge Bourquin on December 14, 1929, a substantial compliance with the requirement of the rule that he "annul and set aside the order and decree of May 31, 1929, dismissing the petitioners' bill of complaint", and shall consider said order of December 14, 1929, in so far as it convenes a court of three judges, a partial compliance with the requirement of the rule that Judge Pray call to his assistance

"two other Federal Judges as provided by section 266 of the Judicial Code, as amended", petitioners pray that this court issue a writ of mandamus directing Judge Bourquin to vacate that part of his order of December 14, 1929, which appoints a Special Master and requires the taking of testimony prior to the hearing on petitioners' application for an interlocutory injunction and sets the case down for hearing on the merits at the same time and place that the application for an interlocutory injunction is set for hearing.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

Dated December 20, 1929.

STATE OF MINNESOTA,
COUNTY OF RAMSEY. } ss.

B. W. SCANDRETT, being duly sworn, deposes and says he is Vice President of the Northern Pacific Railway Company, one of the petitioners herein; that he has read the foregoing motion for the issuance of a formal writ of mandamus and knows the contents thereof; that the allegations of the same are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

B. W. SCANDRETT.

Subscribed and sworn to before me this 20th day of December, 1929.

G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.
My commission expires Oct. 21, 1935.
(Notarial Seal)

FILE COPY

DEC
CHARLES E

Supreme Court of the United States

No. 21, Original—October Term, 1929.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

BRIEF IN SUPPORT OF MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

BRUCE SCOTT,
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Supreme Court of the United States

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BRIEF IN SUPPORT OF MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

That Judge Bourquin's order of December 14, 1929, is not a compliance with the rule to show cause made absolute by this court on December 2, 1929, and that it is a denial of the rights of petitioners that are secured to them by Section 380, Title 28, U. S. C. and by the decision of this court on December 2, 1929, seems too clear to need extended argument.

Proper procedure under the rule to show cause and under Section 380 required Judge Bourquin to vacate his order of dismissal of May 31, 1929, and required Judge Pray to assemble a three-judge court and hear and determine petitioners' application for an interlocutory injunction. Judge Pray's failure to act may be excused because the order of dismissal should have been vacated by Judge Bourquin, leaving the way open for Judge Pray to assemble the three-judge court.

Petitioners are deprived by Judge Bourquin's order of December 14, 1929, of any hearing on their application for an interlocutory injunction. The fact that the language of the

order includes both the application for an interlocutory injunction and a hearing on the merits is of no importance, for the legal effect of the order is to dispose of the case on final hearing and make the hearing on the motion for an interlocutory injunction a mere form.

A district judge, to whom an application has been made for an interlocutory injunction, who has been asked to call in two other judges to assist him in hearing and determining the application, who refuses to do so but issues a temporary restraining order to remain in effect until the case is heard on the merits, is acting directly contrary to Section 380 and is exercising power he is not given by that section. This court in *Cumberland Tel. Co. v. Pub. Serv. Comm.*, 260 U. S. 212, 216, in discussing Section 266 of the Judicial Code, as amended, now Section 380, Title 28, U. S. C., said:

> "The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted, and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecesary conflict between federal and state authority always to be deprecated."

Petitioners deny the power of Judge Bourquin to appoint a master in the case. If a master is to be appointed, the appointment should be made by the court of three judges when convened. We contend that Judge Bourquin ought not to interfere further in this proceeding and has no jurisdiction in it whatsoever, other than to vacate his order of May 31, 1929, and has no right to sit on the court of three judges unless Judge

Pray shall call him to his assistance. The power and obligation to assemble a three-judge court rest upon Judge Pray, to whom the application was made. Section 380 reads:

> "Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* that one of such three judges shall be a justice of the Supreme Court, or a circuit judge."

We may quote once more from *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 544:

> "We say the hearing should have been had as just stated because it results from the text of the applicable section of the act that limitations are unequivocally imposed upon the power of the single justice or judge to act in the character of case to which the provision refers. They are, *a*, to receive an application for an interlocutory injunction in the character of case stated in the section; *b*, within the period specified in the section to grant a temporary restraining order 'if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted;' and *c*, to 'immediately call to his assistance to hear and determine the application (for an interlocutory injunction) two other judges.'"

In *Cumberland Tel. Co. v. Pub. Serv. Comm.*, 260 U. S. 212, the court had under consideration an appeal from an order of three judges denying an interlocutory injunction. One of the three judges made an order of supersedeas and injunction pending appeal. The court said in setting aside the injunction:

> "Equity Rule No. 74, which authorizes a justice or judge who took part in a decision of an equity suit granting or dissolving an injunction to make an order suspending, modifying or restoring the injunction pending the appeal upon proper terms, does not apply to such an appeal or to such a case as this. This appeal is not from a final de-

cree. It is a special proceeding in which the power of a single judge is definitely limited." (p. 217)

While it ought not to be necessary for petitioners to show hardship and damage through failure of respondents to comply with the rule which this court has made absolute, the fact is they are damaged and are deprived of a valuable right by the court's order. Counsel for petitioners have the right to determine how their clients' interests may best be secured and in this case they believe that a decision on their application for an interlocutory injunction will determine legal questions that will in effect dispose of the case so that no hearing on the merits will ever be necessary.

Section 380 provides that:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

If an appeal be taken from an order granting or denying an interlocutory injunction, there can be no hearing on the merits until that appeal is determined. Judge Bourquin's order requires petitioners to submit their case to the master prior to January 25, 1930, and thus makes it impossible for either party to take an appeal from the order made on the application for an interlocutory injunction.

At the hearing on the application for an interlocutory injunction both parties may be willing to have the case finally determined on the record then made and may so stipulate. That was done in *The Railroad Commission of the State of California and the City of Los Angeles, Appellants, vs. Los Angeles Ry. Co.*, decided by this court on December 2, 1929. In the absence of such a stipulation neither a single judge nor

the court of three judges can compel a party against its will to submit its case on the merits at the hearing on the application for an interlocutory injunction.

If petitioners should voluntarily submit to Judge Bourquin's order of December 14, 1929, they in effect would abandon their application for the assembling of a three-judge court and for a hearing on their application for an interlocutory injunction. Not only would they thus surrender a right that they sought in this mandamus proceeding but an anomalous situation would result since a three-judge court is not essential in a final hearing in a Section 380 case unless the application for an interlocutory injunction be pressed to a hearing. No direct appeal to this court lies if there has been no hearing on the application for an interlocutory injunction. As stated above, the hearing on the application for an interlocutory injunction, provided in Judge Bourquin's order of December 14, 1929, would be a matter of form and not of substance.

Moore v. Fidelity and Deposit Co., 272 U. S. 317.

Smith v. Wilson, 273 U. S. 388.

Charles F. Hobbs, Commissioner of Insurance of the State of Kansas, and William A. Smith, Attorney-General of said State, Petitioners for a Writ of Mandamus to The Honorable John C. Pollock, District Judge of the District Court of the United States for the District of Kansas. (decided Dec. 9, 1929.)

Respectfully submitted,

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